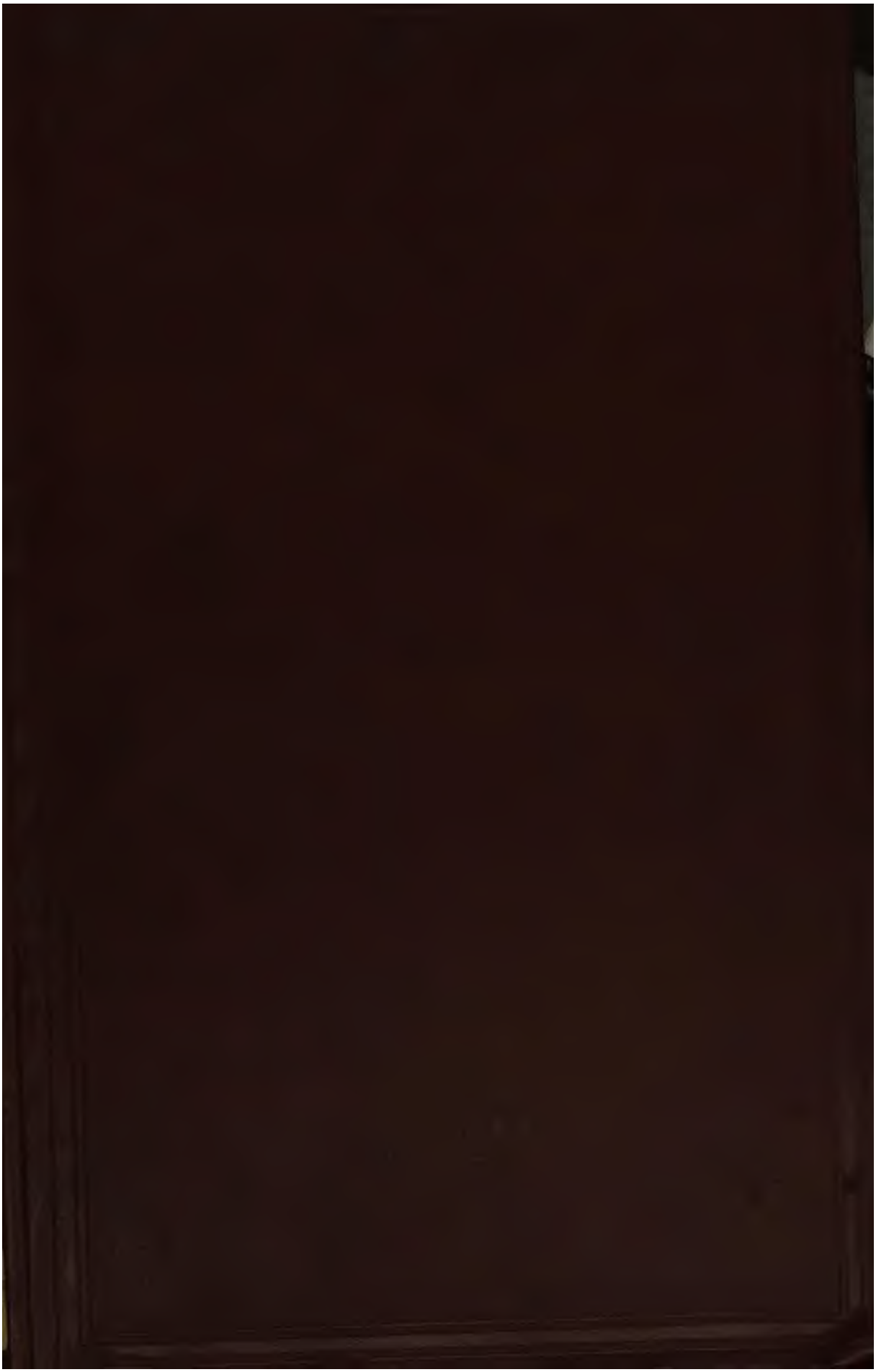

INSTITUTES OF JURISPRUDENCE.

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INSTITUTES OF

JURISPRUDENCE

BY

WILLIAM AUSTIN MONTRIOU

ADVOCATE OF THE HIGH COURT BENGAL.

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1866.

To THE RIGHT HONORABLE

EDWARD HENRY, LORD STANLEY, M. P.

MY LORD,

Availing myself of Your Lordship's graciously accorded permission, I dedicate to you this effort in the cause of law-education. My object is, to bring within convenient compass a categorical and didactic exposition of the elements and principles of jural science. The work is a *resumé* (methodized and compressed) of oral lectures delivered to the law-classes of our Presidency college: its primary intention, therefore, is, to aid those who have composed, as well as all who may compose the college classes.

It is indeed matter of congratulation for the students (as it is for myself), that, on my retirement from the teacher's chair, I have the high privilege of bringing their claims immediately to Your Lordship's notice.

My observation, at the college during eight years, and no less in the Courts as fellow-labourer with the numerous young law-graduates, enables me to testify (rather, I may say, to add my testimony to the general voice), that the ability and the aptitude evinced by native law-students and by native law-practitioners (each grade under no ordinary difficulties), are remarkable—are

worthy of admiration and of every encouragement. Here is a field where liberal patronage cannot be wasted. Much has been done, but much more (in the forensic as in the educational department) is needed, to help on, to do full justice to, the class of educated pleaders *(wukeels)* in the Indian Courts —whether as advocates and lawyers, or as responsible and trust-worthy law-agents. Every advance and encouragement, with this view, must act directly upon the judicial administration: indeed, such are the obvious and readiest means to raise the standard of that administration.

That Your Lordship will not deem what I have said, to be out of place in my dedication, I am assured by what is known of Your Lordship as a statesman and an earnest apostle of progress —above all, as the tried friend of India.

I have the honor to be,
with much respect,
Your Lordship's obedient servant,
W. A. MONTRIOU.

Calcutta,
December 1865.

FIRST BOOK.

PREFACE.

It was not originally intended to divide this work in books or parts: the plan has been adopted in order to meet the wishes and wants of those learners for whose especial use these pages have been written; seeing that the author cannot undertake to fix any definite early period, within which the uncertain intervals of leisure amidst pressing avocations, may permit of his devoting the kind of attention required for its completion.

Although based and built upon (indeed in some respects identical with) the author's 'Manual of Jurisprudence,' of which the second edition was published three years since; this treatise, in its more methodical treatment and more exact analysis of the subject, is something else than an amplification or edition of the former one.

As apology for the anomalous supplement or appendix—being an anticipatory selection from notes, to be worked up and incorporated in the second book—the author can but urge, presumed utility. Granted, that some of the notes are but common-places, even hints, and unconnected; they yet may (it is believed) occasionally help and guide a student; and if they do so, their purpose is fulfilled, maugre their defect of symmetry or of completeness.

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SECTION I

DEFINITION OR SIGNIFICATION OF TERMS, VIZ. JURISPRUDENCE, JUS, LAW, FREE-WILL, REASON, CONSCIENCE, SOCIETY, GOVERNMENT, STATE: DISTINCTIONS, VIZ. PRIMARY SOCIETY AND CIVIL-SOCIETY; NATURAL OR MORAL LAW AND CIVIL LAW; ETHICS AND JURISPRUDENCE.

JURISPRUDENCE is the science [a] of *jus*, Law; the term 'Law' being here used in a familiar but special sense,

ERRATUM

SEC. VII. Transpose notes *(g)* and *(h)*

decay, of vegetation. Thus, the Universe is a mass, a concourse of countless laws and systems of laws.

"Law hath dominion over all things, over universal mind and matter;
"For there are reciprocities of right, which no creature can gainsay;
"Unto each was there added by its Maker, in the perfect chain of being,
"Dependencies and sustentations, accidents, and qualities, and powers:
"And each must fly forward in the curve, unto which it was forced from the beginning". *(b)*

Mankind are endowed with Reason and with Free-will. To ascertain how men should act, what are the

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JURISPRUDENCE is the science [a] of *jus*, Law; the term 'Law' being here used, in a familiar but special sense, to signify all politically enforced or civil rules of conduct.

Jus may also be rendered 'the right,' also 'the rule of right.'

Jus, used more restrictively, is, that which appertains to each, 'one's right.'

Law, in the widest sense, is the action of a principle of uniformity or order: its existence implies authority and implies restraint: it is a means to an end: it is a mode, a condition of being or of acting. Such are incidents or intrinsic qualities of Law, however the term be applied. For example; laws of the solar system, laws of motion, law of gravitation, law of chemical affinities, laws of animal life, of disease, of decay, of vegetation. Thus, the Universe is a mass, a concourse of countless laws and systems of laws.

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"Dependencies and sustentations, accidents, and qualities, and powers:
"And each must fly forward in the curve, unto which it was forced from the beginning". [b]

Mankind are endowed with Reason and with Free-will. To ascertain how men should act, what are the

laws of conduct, to keep in check, to control Free-will —is the province of ethics, also, within a narrower sphere, of jurisprudence.

The Will is variable, turning always, as affected by imperfect, deviating, capricious impulses or secondary laws; which may be regarded as permitted modes or causes of action, rather than laws. Yet, Reason teaches, that the very uncertainty and what, to our limited intelligence, seems the imperfection of those secondary laws, must be in conformity with a supreme rule and law—that what is uncertain and imperfect in our eyes, is so only because too vast and intricate, too fine in operation for us to comprehend. Those secondary laws are traceable in what writers on the science of morals have named, springs of human action—affections, desires, motives.

Man's Reason is a distinctive endowment, a charter of mastery and proprietorship.

The distinctive results of Reason are:

1. Man's religious character, *i. e.* his sense and adoration of Divinity,[c] his desire for religious knowledge;

2. Man's progressive and improving powers, as evinced by language,[d] architecture, agriculture—all science and art[e];

3. Man's social disposition and capabilities[f];

4. Man's dominant power, for evil and for good—*i. e.* as a race over his fellow creature the brute; also of individuals among their fellow-men, as instanced in the heroes, the great exemplars good and bad, of history; Cyrus, Cæsar, Napoleon, Mahommed, Attila.[g]

The material part of Man has within itself germs[h]

of disease and of decay: one body differs from another, in strength, in soundness; but, each body is alike doomed, sooner or later, to perish, or (more accurately), to cease to be the seat of human life—perhaps slowly, yet surely progressing to complete failure of human vitality. Not so with that part of Man which we cannot see nor handle—his soul, his spirit, his Reason. That part, though developed and made known through Man's bodily life, seems to exist independently; having no germ or inherent principle of dissolution—not fluctuating with, although in development affected by, the strength and the weakness, the health and the decay of the body.

Reason does not always nor infallibly protect from error: yet, to act immorally or wrongly is to act unreasonably. Cultivated Reason points and urges to the right road, but often unequally copes with antagonistic forces which are among the springs of human action, and are rival directors of Man's will.

Perfect cultivation [i] and use of Reason must preclude whatever is wrong in action: we have, however, no experience nor record of perfectness in Man. He would not be Man, who had either never known, or who had completely subdued inclination to transgress. Both the option and the inclination are (as Man is, actually or traditionally,) essentially human.

The suggestions, the guidance of Reason, in control of the will, are popularly known as, the voice of conscience. The intrinsic worth and the correctness of those suggestions, in the mind of each individual, vary with mental condition, education, habit.[j] Not

only do minds differ in strength, in original conformation, in degrees of soundness; but the mind's health is easily affected, so as to cripple, though perhaps never (except through bodily disease) so as to annihilate conscience—understanding by 'conscience', the action and exercise of Reason in judgment (or deliberating) upon conduct.

The choice of good or evil is left to Man—a great power, but obviously a great danger.

Jurisprudence, Law, juridical rules, have to do only with the social character and action of mankind, the conduct of men in relation to each other. Man is eminently social; his nature impels him, therefore, to discover, to frame, and to support rules, without which human or rational society cannot be maintained.

All acts of social importance are not within the sphere of Law; *e. g.* benevolence, gratitude, are virtues, simply.(k)

SOCIETY—PRIMARY; CIVIL.

The conjugal, parental, filial, fraternal, and other strictly family ties and affections—differing (because of Reason) from what is similar or analogous among brute animals—constitute the primary form of human society.

The dependence and wants of the weaker members of that primary society, give rise to government, *i. e.* the paramount authority of the man, as husband and father; the authority of parents, for nurture and rearing of offspring.

Thus, every human being is, from birth, subject to government—domestic government.

Primary society originates and grows into that union of individuals and of families known as civil society[l] —a development of Man's characteristic social nature, in a truer sense than primary or family society is; inasmuch as the latter has its type, if not strictly yet nearly, in what we may term the unprogressive animal world.

Mankind are divided and subdivided into civil or political societies,[m] States.

A STATE.

A State is an organized, independent community, having, ostensibly, for common purpose and object, the permanent interest and benefit of all its members—furnishing a settled, continuing, complete social plan of life for the collective body.[n]

As the wants, the desires, the temperament, the tastes of men vary, at different times and in different places, so must the modes of society, the character of States vary, both originally and with the accidents of Time.

But, each State must have,—1. a defined governing power;—2. rules of social conduct, acknowledged by the entire community, and observance of which is compelled by the governing power.

History, as recording experience, gives no description of mankind before their division into civil or political communities. Numerous bodies of men, at various periods, in all parts of the globe, have become civilly separated from the aggregate of mankind, of-course without interruption of their moral and natural relations.

Each body, by and in the course of its separate formation and action, originated or adopted, for its own use and protection, some regulated scheme other than the general rules and laws which (Reason teaches,) apply to all mankind alike; these being known as, the moral Law, the Law of Nature. By 'other than' is meant, more or specially adapted to that separate body and section of mankind who own and use them—not that they are opposed to or, in spirit and intention, differ from the moral or Nature's Law. The one is general, the other particular.(o)

The special or partial rules are civil Law.

Analysis and explanation of the method and rules whereby civil societies are preserved or held together, and in conformity with which every State is organized, is, to enquire of, to develop, the bases, the elements, the principles of jurisprudence.

(a) i. e. skilled, systematic knowledge; or (as the subject of knowledge), the method and doctrine. *Jurisprudentia* is, strictly, skill in *jus;* but it is used (as 'jurology' or some cognate term might be used) to denote the science.

(b) TUPPER

(c) "How striking a proof is it," observes Patterson in his 'Essays in History and Art,' "of the strength of the adoring principle in human "nature—what an illustration of mankind's sense of dependence upon "an unseen Supreme—that the grandest works which the nations have "reared are those connected with Religion! Were a spirit from some "distant world to look down upon the surface of our planet as it spins "round in the solar rays, his eye would be most attracted, as the morn- "ing light passed onward, by the glittering and painted pagodas of "China, Borneo, and Japan—the richly ornamented temples and stu- "pendous rock-shrines of India—the dome-topped mosques and tall "slender minarets of Western Asia—the pyramids and vast temples of "Egypt, with their mile-long avenues of gigantic statues and sphinxes "—the graceful shrines of classic Greece—the basilicas of Rome and

"Byzantium—the semi-oriental church-domes of Moscow—the Gothic "cathedrals of Western Europe—and as the day closed, the light would "fall dimly upon the ruins of the grand sun temples of Mexico and "Peru, where, in the infancy of reason and humanity, human sacrifices "were offered up, as if the All-Father were pleased with the agony of "his creatures! Nowhere has that adoring principle reared grander "temples than in India."

(d) 'Voice-dividing' is Homer's distinctive epithet for Man *(merops anthrowpos*, voice-dividing up-looker). But, some of the lower creation articulate, when taught by Man, even by self-taught imitation, as the parrot, the Indian mina, the magpie. The difference then, lies not in anatomical or physical appliances, in the jaws, the tongue, the palate, nor at all in the mechanical power of emitting organised, distinct sounds. It is the invention, the contrivance, the improvement, the progress in application, the mental effort, therefore, that is human. Hence, we fairly deduce, as a well marked result of Reason, that Man, "the great creature-"worker of the world," has produced "speech, thought's canal—thought's "criterion." With regard to the obvious original differences in the formation of language and the impossibility of the several modes of speech having a single or uniform origin; see Schlegel's *Indian language, literature and philosophy*, b. 1, ch. v.

(e) including Man's sense of the beautiful, an obvious result and apanage of Reason, advancing as civilization advances.

(f) called by Grotius, the social vigour or energy *(vis socialis)*.

(g) and other rulers of men, 'men of their age'; each having a dominant position, the result of his own mental qualities and physical temperament acting upon, as they are urged to action by external events and accidents. The resulting eminence, of character and of power, whether for good or ill, is distinctively human.

(h) For 'germs' may be substituted, a law, a power.

(i) It is not here intended to exalt Reason, however cultivated, into an infallible guide, much less a means of omniscience. The first step in real knowledge (in therefore healthy exercise of Reason) is, humility, a sense of human infirmities. Then, may be attained that only knowledge which is valuable, for its real and ultimate effects, *viz.* a sense of what is right in action—which course to pursue, as a moral, responsible creature.

In the words of Alexander Alison (not always a correct reasoner, although no unsafe guide), "Reason must have certain data on which to "operate. These data consist partly of facts and partly of axioms, and "from these reason draws a conclusion. Such being the process of

"reasoning, it is evident that reason may lead to error as well as to "truth. When it misleads, the fault must not be ascribed to reason "itself, but to a wrong selection of data. If we take certain facts and "axioms and ignore others which ought to have been taken, we shall "obtain a false result. Again, if we take supposed facts, which are not "facts at all, we shall get the same false result; &c." *Philosophy and History of Civilisation.*

Man, it is true, not seldom becomes a slave to the lower grade of powers that act upon his will. "If we say," observes Alison, "that "man, in a partially civilised state, is devoid of a free-will, that "would be, practically speaking, true; but upon that principle we "might likewise say that man is not a reasonable being.—The exis- "tence of reason is the proof that we enjoy liberty of choice; for if "we had not been accustomed to judge and choose, reason could "not have been developed within us, for that power comes from expe- "rience."

(j) "Faults in the life breed errors in the brain,
"And these reciprocally those again:
"The mind and conduct mutually imprint
"And stamp their image in each other's mint."

COWPER

(k) It were perhaps more correct to say—such virtuous conduct, although may-be within the range or protection of any juridical scheme, is not within its direct purpose and aim. Social virtue and morality, though not as such and universally compelled, is (according to the opinion and intention of each particular legislator) universally kept in view, is recognised and encouraged, therefore inevitably sanctioned and upheld by every scheme. Kant, having explained and distinguished the internal (mental) laws of moral action, their scope and origin, defines *jus*, in a broad, collective sense, to be, "the entire body of such laws as are "susceptible of outward legislative expression"—in other words, which are capable of being transferred into any code of positive or civil Law. And Kant describes the *juris-peritus* or jurist (worthy of the name) to be, one versed in the science of *jus*, and who is also acquainted with its application, as external law, to the emergencies of daily experience; such twofold skill being, jurisprudence. "The legislation of "morals," wrote Kant, "is not susceptible of external embodiment; "whilst juridical legislation is that which may also be external. "Thus, it is an external duty [*i. e.* matter of express obligation] to "keep the promise of a contract; but, to keep that promise because "it is a duty, uninfluenced by other consideration, would be a result

"solely of the internal legislation [*i. e.* of mental action]—it is not "within the power [province, reach] of an external [*i. e.* political] "legislator." He instances also the moral virtues resulting from mere benevolence, which, although outwardly developed, are regarded as simply moral, because not susceptible of any legislation, save that which is internal—the purely rational. A more ordinary, and to many perhaps more practically intelligible way of putting the matter, is Mr. Burton's, in his introduction to Bentham's Works; *viz.* "That "which it may be each man's duty to do, it may not be right for "each legislator to enforce upon his subjects, because the very act of "enforcement may have in it elements of mischief to the community, "preponderant over the good accomplished by the enforcement. In "other words, it may tend to the greatest happiness of society, that "a man should voluntarily follow a certain rule of action; but it may "be injurious to the happiness of the community in general, to com- "pel him to follow such a rule if his inclination be against it." Usury laws are instanced. Perfectability of individual character, as the aim or standard of political organization, is a dream of Antiquity. No such theory is maintained by modern statesmen, legislators, or political philosophers. The sphere (circle or arena for action) of Government has long been held to be one of and for security and liberty in civil union (perhaps for acquisition of material wealth also), however it may more or less coincide with the sphere of ethical rectitude, or of religious injunction and warning.

The first Christian missionary, Paul (a learned Jew), thus speaks of a righteous people ignorant of the Jewish polity, as of the Gospel, (the only positive codes of right-doing which he recognised), "—not "having a Law [-positive], they do, by Nature ['s Law], what the Law "enjoins: they are a Law [a standard of right] to themselves: in them "is seen the operation of the Law, as it is written in their hearts, tested "by conscience and by mutual discussion." and—"shall not [that lower "condition, *viz.* gentile] uncircumcision, which is of Nature merely, if "it fulfil the Law [*i. e.* what is just and right, as declared by our "Law-positive], be as a reproach to thee [O Jew!], who, in spite of "record and of symbol, [*viz.* a promulgated and working code of laws], "dost overstep Law?"

In those sentences the one word translated 'Law' illustrates variety in construction or formation (if not in origin) of a standard of conduct.

(l) From *civis* a member of a defined community, in the formal, national or secondary stage of society.

(m) From *polis* (Gr.) the same as *civitas*, a city, state.

(n) So Aristotle: "—a state is a society of people joining together "with their families, and their children, to live well, for the sake of a "perfect and independent life——the end for which a state is established "is that the inhabitants of it may live happily——it is a community of "families and villages, formed for the sake of a perfect, independent "life—" *Politics.*

The independence referred to may be nominal or little better than pretence; yet, if the theory and scheme of the weakest polity be a recognized self-government, however *de facto* checked or over-awed, the civil description is satisfied. Without the element of independence, the description would be indefinite, or would include other species of federation, a mere club, a collegiate society. All private associations however (as, colleges, clubs, even clans) have some particular and limited object or class of objects: moreover, every member of any such association must also be a member of a political community, whose laws have necessarily a paramount influence over his conduct, and cannot be in any respect superseded by those of the private association. Obviously then, such association can exist but in exercise of the political liberty allowed by the State in whose territory its operations are conducted.

"The chief object," reasoned Samuel Coleridge, "for which men, who "from the beginning existed as a social bond, first formed themselves "into a state, and on the social superinduced the political relation, was "not the protection of their lives, but of their property. The natural "man is too proud an animal to admit that he needs any other protection "for his life than what his own courage and that of his clan can bestow."

Some have denied to a wandering (though united) people, a national character, considering (not merely property, as Coleridge, but) a permanent territorial seat an essential part or element in the definition of a State. "Theorists," wrote Heeren, "usually define a civil community as "constituted by the possession of sovereignty, whether exercised by the "whole body, or by a few, or by one of its numbers. This definition, "however, is of little practical use in the study of history, for there are "many nations to which it would apply, and yet of whom it would be "hard to say that they form a state, and live in civil society. All the "great pastoral tribes are, or at least were, in possession of sovereignty "as independent nations; and this sovereignty was exercised by the "heads of particular families among themselves; and yet no one would "argue that the Calmucs or the Kirgisian and Arabian Bedouins, form

" what is properly termed a state (civitas). This, in fact, if we use the " word in its common historical sense, can only be constituted by a peo- " ple, whether great or small, *which possesses and permanently inhabits* " *one particular country* ; or in other words, *fixed places of abode and* " *possessions in land* form the second *necessary* qualification of every " state, in the particular sense of the word. The reason of this is, that " the whole institution, or assembly of institutions, which we term a state, " attains its development and application only by property in land."

The *Sastras* count seven elements of a realm or State,—*viz.*

" a ruler, a minister, a people, a stronghold, treasure, power to punish, " and allies".

(o) Of primary or præ-civil society, Kant naively remarks : " there " is no room here for an *a priori* law, such as—It is meet that we enter " into that state—as may be asserted of the juridical condition (*status* " *civilis*), *viz*—it is meet that all men, (or such as are susceptible of juri- " dical relations) enter into that state [the civilly social mode of life]."

The question, however, remains—is not civil union simply a natural, although secondary—an inevitable stage of human progress, into which families and individuals of the rational race, Man, as an universal or ordinary rule, and following a law of the species, could not but drift onward? We know that Reason and human sympathy hold together families long after the necessity of nurture has ceased. That necessity, which, as it creates or indicates also limits family ties with other animal races, is but the cause and beginning of those ties with mankind. Each parent may, often must belong to a distinct family group ; individuals of opposite sexes and of distinct or distantly connected families inevitably meet, hold converse, found new families, thus, very early (even supposing several original families), numerous changes in the simple family association must have been produced. No laboured reasoning, no far-fetched nor conjectural hypothesis is needed, then, to extend a family to a clan, a tribe, a people—linked together indeed by individual ties, but not necessarily having, within living memory, any one ancestor common to the entire body.

History, experience, necessary deduction, alike demonstrate how the progression and phases of such grouping must have extended indefinitely. Thus was formed patriarchal government, the stepping stone to monarchy ; thus, clan-chieftain-ship ; thus, in fine, all intermediate modes or stages between the mere paternal and the merely civil forms of government. Indeed, to one thus reflecting, the difficulty seems to be, to account for the settled variety, the original separation, the distinct

characteristics of human groups, who by nature are one (whether or not in origin, at any rate) in possession of Reason, in capabilities, in physical and mental tendencies.

"Nothing is more elevating than the study of the human race through "its successive phases of existence. Through long ages this birth of "nations has been going on, each learning for itself the lessons of life. "And each of those nations, whether ancient or modern, has attached "itself in a peculiar manner to some one of the many forms of truth, "carrying it to greater perfection than the other sections of the race.— "To the eye of the philosopher, the world is a prism through which "Truth is shining; and the nations are the various colours and hues of "the spectrum into which that light is broken." PATTERSON, *Essays in History and Art.*

As to one, perhaps the familiar theory of formation of States, two extracts from Hume's essay 'Of the original contract' well epitomise its character and defects:—"No compact or agreement, it is evident, was "expressly formed for general submission; an idea far beyond the com- "prehension of savages: Each exertion of authority in the chieftain "must have been particular, and called forth by the present exigencies of "the case: the sensible utility, resulting from his interposition, made "these exertions become daily more frequent; and their frequency gra- "dually produced an habitual, and, if you please to call it so, a voluntary, "and therefore precarious, acquiescence in the people." and, "Did one ge- "neration of men go off the stage at once, and another succeed, as is "the case with silk-worms and butterflies, the new race, if they had sense "enough to choose their government, which surely is never the case with "men, might voluntarily, and by general consent, establish their own "form of civil polity, without any regard to laws or precedents which "prevailed among their ancestors. But as human society is in perpetual "flux, one man every hour going out of the world, another coming into "it, it is necessary, in order to preserve stability in government, that "the new brood should conform themselves to the established constitu- "tion, and nearly follow the path which their fathers, treading in the "footsteps of theirs, had marked out to them."

Hume calls attention to an ancient term for rebelling, *viz. neowterizein*, 'to devise a novelty' 'to disturb what is settled.'

How suggestive is the following account of the *termes* or white ant of Brazil!

"Consisting, in each species and family, of several distinct orders of individuals "of no fully-developed sex, immensely more numerous than their brothers and sis-

"ters, whose task is to work and care for the young brood.—The neuters in these "wonderful insects are always divided into two classes—fighters and workers; both "are blind, and each keeps to its own task; the one to build, make covered roads, "nurse the young brood from the egg upwards, take care of the king and queen, who "are the progenitors of the whole colony, and secure the exit of the males and "females, when they acquire wings and fly out to pair and disseminate the race—the "other to defend the community against all comers.—The workers and soldiers are "wingless, and differ solely in the shape and armature of the head. This member in "the labourers is smooth and rounded, the mouth being adapted for the working of "the materials in building the hive; in the soldiers the head is of very large size, "and is provided in almost every kind with special organs of offence or defence in the "form of horny processes resembling pikes, tridents and so forth. Some species do "not possess these extraordinary projections, but have, in compensation, greatly "lengthened jaws, which are shaped in some kinds as sickles, in others as sabres and "saws.—Whenever a colony of *termites* is disturbed, the workers are at first the "only members of the community seen; these quickly disappear through the endless "ramified galleries of which a *termitarium* is composed, and soldiers make their ap- "pearance."—BATES, *Naturalist on the river Amazons.*

Thus operates and thus wonderfully is adapted the mysterious, uniform, unprogressive power of instinct in the lower creation. Man too has various (mechanical and other) special appliances of bodily form, has dispositions of temperament and of passion; but, above all towers his distinctive, improvable, elastic endowment, which may control and moderate, at all events applies and wields all, as instruments. Social action in both orders, is the aim, the means, the normal method. "This having "to keep up" wrote Grotius "a social condition (*societatis custodia*) suit- "able to human intelligence, is the source of *jus* properly so called, to "which belong—abstinence from what is another's; restoration of what "is another's with any profit derived from it; obligation to fulfil pro- "mises; reparation of culpable damage; punishment where due."—thus attributing the entire cycle of Law and its modes, to the characteristically human social necessity, as a merely natural sequence.

SECTION II.

SANCTIONS—1. NATURAL, 2. CIVIL; THEIR ANALYSIS AND OPERATION.

Breach of any one of those primary and principal laws upon which civil society is based—out of and in conformity with which all social schemes of human contrivance grow (—the self-existent, self-promulgating code of Nature), carries with it some proportionate penalty, not inflicted by human power but worked out by the subjective force of the sin itself. Each attendant penal consequence is a sanction[a] to the law which it vindicates. Observation and experience of sanctions operate upon Man's will, producing a spring of action that (when no more powerful motive intervenes) leads to obedience.[b]

Sanctions of natural or moral Law are threefold; religious, moral, physical.

What religious sanctions are, Man learns by yielding to the religious sense implanted in him, and by cultivation of his innate desire for religious knowledge; being thus led to rational appreciation of Divine beneficence and of Divine wrath.[c] The constant appeals, in an inchoate or defective civilization, to supernatural tests of guilt, are a primary and rude development of Man's religious sense.[d]

Moral sanctions are various; such as, remorse, loss of sympathy and of society: physical sanctions are, disease, pain, death.

The inevitable operation of natural sanctions coexists with continued experience and need of them.

As before shewn, Reason brings knowledge, but Reason does not, certainly or uniformly, preserve from error.

Obedience produces and is attended by results which are the converse and correlative of the penalties of transgression:(e) in each class of sequences or sanctions is seen the action of a principle of order, permeating and regulating both the moral and the physical world.

CIVIL SANCTIONS.

Civil Law, as moral Law, has its appropriate penalties or sanctions, civil sanctions, imposed and inflicted by authority of the Government or State.

The penalties of civil Law are enforced in a manner, and are, in their nature and character, equally intelligible to all; they act, for the most part, on the bodily sense, but, through that sense, upon Man's incorporeal nature—staying and restricting motion of the limbs, exercise of every bodily faculty which makes life enjoyable, straining and torturing the nerves of sensation, depriving of property and civil rights—thus, multiplying and varying bodily and mental suffering, even unto death. How such suffering differs from remorse, from loss of sympathy, from all merely moral sanctions is obvious.

The civil sanction may be considered as copied or modified from the physical sanction of moral Law;(f) differing from it in that the latter is Nature's ordinance, not needing human agency for its infliction, the former, an act of civil, human authority—artificial.

All sanctions of moral Law co-exist with, they are even enhanced, when followed or accompanied by civil-law sanctions: legal punishment is not without moral effect, and can scarcely lessen remorse for sin.

The general effect or power, and therefore the political action of all sanctions, is, upon and through Man's proneness and subjection to fear: in other words, expectation of sanction generates a fear or dread of—a shrinking from any course of action with which the idea of such sanction is blended; for sanction is suffering, torment, woe.

Fear is a powerful and universal spring of human action, varying in intensity or degree with individual temperament, but less fluctuating and partial, in its access and effects, than any other influence on or mover of the will. Wherever there is doubt of consequences there is fear of evil, although tempered by hope of good.

Austin ignored all sense of duty or obligation other than that represented by dread of penalty or sanction, holding—"That bond, *vinculum* or *ligamen*, "which is of the essence of duty, is, simply or merely, "liability or obnoxiousness to a sanction." and, "where "the fear of the evils which impend from the Law has "extinguished the desires which urge to breach of "duty, the man is *just*. He is not compelled or restrained by fear of the sanction, but he fulfils his duty "spontaneously. He is moved to right, and is held "from wrong, by that habitual aversion from wrong or "injury, which the habitual fear of the sanction has

"gradually begotten."[g] A *pseudo* or *quasi*-virtue, a mask or semblance of virtue!

A truer idea of sanction would seem to be obtained from the simile of an armed sentinel, whose office it is to guard the sanctity of a prohibited limit, the passes of right (*jus*), the Law's boundary-mark.

To what extent, how, men are entitled to inflict and to vary the terror of human sanctions, is a problem for the moral philosopher: it also belongs to the science (or, as some would say, the art), to a definition of the duties and office of legislation; which science teaches, in detail, what civil laws ought to be—when to be modified, when repealed.

The legislator's wisdom and skill supplements, as it illustrates, jurisprudence; nor are the two sciences separate in principle, but rather in close affinity, if not connate. Legislation ever follows and attends upon the practical development of Law. This will be apparent as we proceed. And hence, jurisprudence has been well described, 'the laws of laws' (*leges legûm*), *i. e.* the laws or rules by or according to which civil laws exist and are constructed. [h]

The horrid ingenuities of the Torture; Mutilation; absolute, continued Solitude; Death, except, perhaps, for malicious homicide—such, at least, are questionable sanctions.

As observed by the latest analyst of English criminal Law[i] upon this "part of our institutions"—"Surely none can have a greater moral significance, or "be more closely connected with broad principles of "morality and politics, than those by which men right-

"fully, deliberately and in cold blood, kill, enslave, and "otherwise torment their fellow creatures."

(*a*) From *sancire* to ratify, to make effectual.

(*b*) An obedience differing, in character as in origin, from that which is born of Man's moral sense (the internal legislation of Kant).

(*c*) Religion, in a sense intelligible to the theologians of every creed, has been described, 'the frame of mind of a man who habitually views this life in reference to the unseen and eternal world, and who regulates his conduct accordingly.'

(*d*) The author of the 'Ayeen Akbery' thus instructs the judicial functionaries of the empire: "—if the merit of the cause is so doubtful, "that the judge cannot take upon himself to pass a decision, he shall "propose the Ordeal." (Gladwin) The Ordeal was familiar to Hindu polity, but, it would seem, in civil cases, as an alternative where rational proof was not forthcoming—"Legal proofs are described as, writing, "possession and witnesses. In the absence of either of those, it is "ordained, that some one of the ordeals be resorted to." (YAJNAVALKYA)

In Manu, we find the immediate precursor or the substitute for trial by ordeal referred to, *i. e.* torturing the conscience of a litigant or of an accused—not the ordeal itself, *viz.*—"In cases, where no witness can be "had, between two parties opposing each other, the judge may acquire "a knowledge of the truth by the oath of the parties; if he cannot "(otherwise) perfectly ascertain it. By the seven great *rishis*, and by "the deities themselves, have oaths been taken for the purpose of judicial "proof; and even Vasisth'ha, being accused by Viswa'mitra (of murder), "took an oath before the king Sudaman, son of Piyavana." Yajnavalkya further declares,—"The scales, fire, water, poison, the sacred draught: "these are the ordeals for exculpation in case of grave accusations, "if the accuser be prepared to pay a fine."—"In case of offence against "the monarch, or great crime, ordeals shall always be gone through." In the Ghurka-Hindu State of Napal, civil suits are, on choice of the parties, referred to the ordeal (*nyáya*); but it is not encouraged. (*See Journal As. Soc.* 1st vol. p. 266.) In Rajpootana, "the trial by *sogun*, literally "'oath of purgation,' or ordeal, still exists," says Col. Tod in his *Annals*, and goes on to observe—"Trial by ordeal is of very ancient date in "India; it was by 'fire' that Rama proved the purity of Seeta, after her "abduction by Ravana, and in the same manner as practised by one of "our Saxon kings, by making her walk over a red-hot ploughshare.—"Where justice is denied, or bribery shuts the door, the sufferer

"will dare his adversary to the *sogun*, or submission to the judg-
"ment of God; and the solemnity of the appeal carries such
"weight, that it brings redress of itself, though cases do occur
"where the challenge is accepted—" In the middle ages of Europe the ordeal was a frequent resort; and trial by martial combat, even in civil litigation, came to be an ordinary substitute for negative purgation, *viz.* denial or repelling upon oath of the charge of falsehood in maintenance of possession or title. Montesquieu observes: "I conclude that,
"under the circumstances of time in which the trial by combat and the
"trial by hot iron and boiling water obtained, there was such an agree-
"ment between those laws and the manners of the people, that the laws
"were rather unjust in themselves than productive of injustice, that the
"effects were more innocent than the cause, that they were more con-
"trary to equity than prejudicial to its rights, more unreasonable than
"tyrannical." In the same category are auguries, omens, and what may be called popular superstitions. Heeren thus refers to Plutarch's praise of Anaxagoras—that he had "freed Pericles from that superstition
"which proceeds from false judgments respecting auguries and prodigies,
"by explaining to him their natural causes."—*viz.* "He who bears in
"mind the great influence exercised by this belief or superstition on the
"undertakings of the statesmen of antiquity, will not mistake the
"importance of such instruction; and he will also understand the
"consequences, which could follow this diminution of respect for the
"popular religion in the eyes of the multitude. The persecution of
"Anaxagoras for denying the gods and exercising his reason respecting
"celestial things, could not be averted by Pericles himself, who was
"obliged to consent to the banishment of the philosopher. And this
"was the commencement of the contest between philosophy and the
"popular religion—"

(*e*) that is, in the first place, immunity from a large class of the aggregate of 'ills that flesh is heir to'—all such as, immediately or mediately, result from the sufferer's wrong-doing; 2ndly. self-approval, and good repute, with the great and multiform blessings of which they are the source.

(*f*) Human punishment also imitates the moral penalty of Nature's Law; by exposure to shame and obloquy, by modes of inviting scorn and derision. In such cases, infliction of physical pain may seem to be a secondary object (although, usually, the moral degradation, however obvious and intentional, is but auxiliary); yet, at any rate, civil Law chiefly counts, for its influence on the masses, upon the body's suffering.

(*g*) This is surely a libel upon our race. Sanctions (*i. e.* sentinels,

executioners!) are certainly needed, at all times for some, occasionally for all; but, history and experience prove they are not the sole source of felt obligation in the honest breast. Fear has not entire monopoly, nor has she always pre-audience *in foro conscientiæ, i. e.* in the conflict of motives that govern the Will.

The true principle was arrived at by Aristotle; who in the 10th. book of his Ethics, proves the action and necessity of the penal sanction, as an alternative where nature or education have not created a better and prior motive, "—because he who is good, and lives with regard to the "principle of honour, will obey reason; but the bad man desires pleasure, "and is corrected by pain, like a beast of burthen."

A refined distinction is drawn by some moralists between the rectitude of an action and the obligation to perform it; as,—"It might be right "for me to relieve a beggar, but I am under no obligation (to him at least) "to do it.—The rightness of an action is its congruity with the relations "of the agent. Obligation to the action is the power which Law, enforced "by penal sanctions, possesses to secure the doing of it." (PAYNE)

But this seems a narrow view of moral obligation, and supposes a moral option in the practice of the most ordinary virtues. Besides, is not the deprivation of that moral reward which all admit to attend a disinterested, purely benevolent, unconstrained act, a penal circumstance?—or, is it a moral doctrine, that men may attain to a superfluity of goodness and rightness? Occasionally, but seldom, a civil law (or, a rule promulgated as such,) invites and persuades, instead of threatening, *e. g.* bounties, bonuses, guarantee of privileges. But, this exceptional legislation is no exception to the characteristic of civil-law sanctions, as above described; nor can that be a positive mandate or a law properly and technically, which does not prohibit and compel, but invites only and induces by a promise. The offer of reward necessarily implies a lawful alternative; it advances a policy, rather than indicates a law. Promise of reward and threat of pain, have been by some writers put in the same category, as sanctions. This, for the reason given, is considered an error. Obedience to the precept, acceptance of the offer, creates a right; as any conventional contract might do.

Bentham admirably illustrates (in his 'Deontology') the operation of sanctions, both natural and civil, by the biographical contrast of his ideal characters, Timothy Thoughtless and Walter Wise.

(*h*) Opinions as to the affinity or diversity of legislation and jurisprudence are not uniform: but then it is by no means agreed what is the special province or subject of the latter science.

"Jurisprudence is not," writes Mr. James Stephen, "strictly speaking, "the science of Law, but the science which classifies and describes the "relations with which Law has to deal, and so points out the limitations "imposed on the power of the Law given by the subject-matter with "which he is connected, just as the science of mechanics instructs the "engineer in the resources of his own art. Thus the first service render- "ed by the jurist to the legislator is to submit to him the series of "alternatives placed at his disposal by the state of affairs."

"It is impossible," wrote Austin, "to consider Jurisprudence quite apart "from Legislation ; since the inducements or considerations of expedien- "cy which lead to the establishment of laws, must be adverted to in ex- "plaining their origin and mechanism. If the causes of laws and of "the rights and obligations which they create, be not assigned, the "laws themselves are unintelligible."

(i.) JAS. STEPHEN

SECTION III.

THE THREE FUNCTIONS OF SOVEREIGNTY DEFINED: DISTRIBUTION OF FUNCTION OR OF POWER, AS DETERMINING THE CHARACTER OF STATE-POLITY.
MODES OR CLASSES OF CIVIL LAW.

The preceding pages have enabled the student to acquire correct general conceptions of Law, of Society, of the formation of States, of Sanctions.

Each is a complex or concrete idea, and is further resolvable into jural principles, by analysis and comparison.

Schemes of Law, forms of civil society, States, sanctions—each and all have one common aim and purpose, *viz.* enforced order: and this phrase furnishes a universal key to civil government and to Law. Government is active power, force; whence-soever derived, how-soever exercised. Political government supposes a system, a prescribed mode. If a single, unchecked will furnish the rule and mode, the ruler (whilst he rules) is accepted as a moral—at least an inevitable superior; and his behests are Law. So that, government pre-supposes Law and a continuing source of Law, as its basis and spring of action: Law is inseparable from government. Politically organized government is distinctively termed, sovereignty.

The entire functions, office and action of sovereignty are comprised and reducible, in object, under three general heads: 1. to make and promulgate laws—Legislation; 2. to determine when and by whom the

Law is infringed, to apply remedies, to assign sanctions—Judicature; 3. to wield the physical (active, punitive, ministerial) power of the State—Executive.[a]

Those several functions may, all or any, be united or separate. Russia, China, Persia, the Roman empire, are examples of all being united in one man. In the frame or constitution of the State of Great Britain, each one is, in theory at least, separate, and has independent (not irresponsible) action; *viz.* the Parliament; the Courts of justice; the Crown (without political personality).

It follows; that civil societies or States vary from each other, 1st. in the distribution and arrangement of the functions of sovereignty; 2dly. in the provisions and character of their respective codes or systems of Law.

Thus may be determined or designated, analytically, each species of polity—each mode of State mechanism. But the generic character and class of each is practically defined with reference to the seat of governing power, in the aggregate, whether the functions be separate or confused. Aristotle, in his *Politeia*, explains:—

"It is evident that every form of government or "administration (for the words are of the same import) "must contain the supreme power over the whole "State, and that this supreme power must necessarily "be in the hands of one person, or of a few, or of "the many; and that, when the one, the few, or the "many direct their policy to the common good, such "States are well governed: but, when the interest

"of the one, the few, or the many who are in office, "is alone consulted, a perversion takes place."

Aristotle goes on to name and distinguish several modes; a kingdom or monarchy; an aristocracy (rule of the best); and a polity.(b) The last name is common to all governments, but is used and described by Aristotle as one in which "the citizens at large "direct their policy to the public good." The perversions of each kind he designates respectively, a tyranny, an oligarchy (rule of the few), and a democracy (rule of the populace).

And these he describes: "A tyranny is, a mo- "narchy where the good of one man only is the "object of the government; an oligarchy considers "only the rich; and a democracy only the poor; "but neither of them have the common good of all "in view."

Aristotle adds,

"An oligarchy and a democracy differ in this from "each other, namely, in the poverty of those who "govern in the one, and the riches of those who "govern in the other; for, when the government is in "the hands of the rich, be they few or be they "more, it is an oligarchy; when it is in the hands of "the poor, it is a democracy. But, as we have al- "ready said, the one will be always few, the other nu- "merous; for few enjoy riches, but all enjoy liberty."(c)

This succinct account of modes of civil government or sovereignty suffices, as an *a priori* description. In History and in the living theatre of the peopled Earth, are examples more various and

complex; severally ranging under one or other of those generic forms.[d]

CLASSES OR BRANCHES OF CIVIL LAW.

Rules of Law, according to which each State is governed and works, are classed and divided, with reference to object and purpose: *viz.*

The body of rules that regulate distribution of political power and functions (the *formula* of action) in a State, are called, 'the constitution' of the State: the science of those rules and of their application is 'constitutional Law.'[e]

The relations which the constitution establishes between the governing body and the people—rules to govern the intercourse of the State—the body of the nation—the functioning or governing authorities—with the subjects, and defining the constitution itself, the duties and the limits of its several branches, are, 'political laws.'

Rules which order the conduct of citizens, members of a civil society, one towards the other, rules of individual and private intercourse, which describe and redress injuries, are, 'private Law.'

Rules which control the conduct, the action, the ordering, as well of the collective body, the State itself, as of individuals towards and in reference to the State, are, 'public Law.'[f]

The former, private, is also called, 'municipal[g] Law.'

Again, rules of Law, the breach of which is considered directly to concern and to merit pursuit by the

entire community, the State, as a party injured, *e. g.* rules forbidding to destroy human life, rules forbidding acts which may impede any function of government—rules so viewed and followed up, are, 'criminal or penal Law.'

The other class of municipal laws, where the sanction is a private remedy and compensation, not a public pursuit or punishment, is, in a particular, restricted sense, 'civil Law.'(*b*)

An illegal act may be at once a crime and a civil wrong: in respect of the former, the public avenger strikes; for the latter, the wronged citizen is compensated. The punished thief should restore his spoil; the punished rioter should remedy what his violence has caused.

(*a*) To this, the executive function, in analysis and distribution of government, is usually considered to belong, a watchful superintendence and adjustment of the entire political machinery, especially care and dispensing of the State finances, also a right and duty to represent the dignity as well as might of the community, at home, and in intercourse with other nations. Here is the field for statesmanship, for the skill of the politician, of the diplomatist; for a Machiavelli, a Todur Mull, a Peel, a Sully, a Talleyrand.

(*b*) This word may be rendered, a commonwealth. Aristotle (in his *Rhetoric*) calls 'polity' a timocracy, of which sort property is the basis. He gives the preference to monarchy, and places timocracy last, "since it "naturally inclines to be in the hands of the multitude, and all who are "in the same class as to property are equal." But he considers tyranny to be the worst of the perversions or deflections. He compares the variations of political government with those observed in families.

(*c*) Modes of sovereignty have been also designated; three legitimate, *viz.* autocratic, aristocratic, democratic; two bastard ones or abuses, *viz.* oligarchic, ochlocratic. Of these, the former term signifies arbitrary monopoly by a party or class; the latter, domination of the crowd or multitude.

(*d*) The annals of Great Britain, of the Venetian republic, of France, of the American federal union—together form a repertory and illustration of all methods of sovereignty. Dr. Whewell in his *Elements of Morality* analyses the normal tendencies to differing forms of government. I make a short extract:

"The natural tendency of the progress of time is to generate an "aristocracy; but this tendency may be counteracted by the activity of "the democracy. Again, the democratic element may be so feeble that "the nation may be entirely governed by the past;—by an ancient "aristocracy, or an ancient line of monarchs. Where freedom is thus "extinguished, the State answers its moral ends imperfectly. Again; "the monarchical element may be enfeebled in various ways: as by "dividing the executive from the judicial character; by presenting the "State itself, not the king, as the source of justice, and by distributing "the sovereign executive power. The executive power may be held but "for a short time, as by consuls or presidents for a year, or a few years. "By such means, democracy may be established, with very small evident "mixture, either of monarchy or aristocracy."

A recent traveller in Central Africa describes 'Abeokuta' as a federal republic under a perpetual president, and considers that people, whom he describes as "the remotest and most barbarous of African tribes," to be a living refutation of the opinion, that the Greeks invented federal government. BURTON, *Exploration &c.*

(*e*) "The fundamental regulation that determines the manner in "which the public authority is to be executed, is what forms the *Consti-* "*tution of the State.* In this is seen the form by which the nation acts "in quality of a body-politic: how and by whom the people ought to be "governed; and what are the laws and duties of the governors. This "constitution is in fact nothing more, than the establishment of the "order in which a nation proposes to labour in common for obtaining "those advantages with a view to which the political society was estab- "lished. VATTEL

(*f*) "Public Law has for its object the State, that is, the organic "manifestation of the people: Private Law embraces the legal relations "between individuals, and is the rule or expression of those relations."

SAVIGNY (trans. by Sir G. Bowyer)

(*g*) *municipium*, a town, a civil community.

(*h*) "Criminal jurisdiction is the public power of taking cognizance of "crimes, and imposing punishments for the public welfare——civil juris- "diction is that which has for its object the application of laws not "intended for the punishment of offenders, but declaring, defining or "creating natural or civil, immutable or positive rights." BOWYER

SECTION IV.

COMPONENT PARTS OF A LAW, AS A CIVIL RULE: THEIR ANALYSIS AND OPERATION. LIBERTY; EQUALITY.

The jurist has to do with the origin, analysis, definitions, composition, meaning, application, differences, of laws—of those rules of conduct and intercourse, which are at once the growth and the cement of civil society.

The necessity, and therefore the origin of Law, has been shown, *viz.* 1. natural or moral, as coeval with the human family, 2. civil—the growth of society, and medium of organised government.

So, the analysis, definition and composition of every civil law, are severally deducible from conclusions already arrived at; which may be thus summed up or epitomised.

All laws of conduct are based on or spring out of the one universal, immutable Law. Following, led by Reason to follow the mighty Lawgiver of the universe, men frame rules of conduct, which are not part of the general Law, inasmuch as they are not, nor are they intended to be, of universal force or application, but are subsidiary and supplemental—an adaptation and carrying out of the spirit of the general code or scheme of right and wrong, to suit the peculiar circumstances of a portion of the race of Man. All however, in all ages, and in all places, are bound by that general code: it follows that, the particular laws deduced from or added to it, should not infringe any part of that

code, but, on the contrary, should harmonize and fall in with, although not of it.

Such was the doctrine of the great ethical and political philosopher already quoted :—

"Law, now, I understand," wrote Aristotle, in his *Rhetoric*, "to be either peculiar or universal; peculiar, "to be that which has been marked out by each peo- "ple in reference to itself, and that this is partly "unwritten, partly written. I call that Law universal, "which is conformable merely to dictates of nature; "for there does exist naturally an universal sense of "right and wrong, which, in a certain degree, all in- "tuitively divine, even should no intercourse with "each other, nor any compact have existed—"

Thus, civil Law is a development of moral Law: breach of a civil law is a breach of duty, a moral transgression. It is, however, a breach which might not be possible at other than certain times, in other than certain places, between others than certain men. In respect therefore of their particularity, of their merely local or personal application, civil laws are properly said to be different from and beside the moral Law.

Yet, as has been demonstrated, the first element, the ground-work, the warrant, of every civil law must be, the moral Law.

But, the command, the mandatory dogma or rule in a particular civil law, may contain more than any moral law enjoins, *e. g.* a prohibition to kill wild animals (*ferœ naturæ*) fit for man's food, as woodcocks, hares, snipe; a prohibition to grow tobacco or opium,

to export or to import corn, wines, &c; a command to build, to cultivate, even to wear clothes, after a prescribed mode. Such forms of legal restraint have a merely relative and temporary value: they are, in the main, purely arbitrary and speculative.[a] Yet the circumstances of a particular State may render such innovations upon or supplement to the moral Law properly and morally expedient. This, then, is a conventional or civil element; and it enters into the composition of civil laws, generally and as a rule: for, even those laws which sound as mere repetitions of what the moral Law enjoins, *e. g.*—Slay not a man! Take not that which is another's!—are, strictly, no exceptions. Different codes of civil Law define differently, according to the conventional opinions or the necessities of each community—what is criminal homicide, and its varying shades: so, the definition of what is another's, also what constitutes a wrongful appropriation, vary in different States.

The most distinctive and universal feature of difference in the two codes, of Nature and of Man, is, the arbitrary or civil sanction.

"Execution," pithily wrote the great English lawyer, Coke, "is the life of the Law."

Execution, punishment, penalty, sentence—are terms expressive of the vital action and force of civil Law: when they cease to have meaning or effect, Law has no civil or political existence; it is, then, but a precept or dogmatical injunction.

"Justice," declares the *Dharma Sastra*, "was "created by Brahma under the form of Punishment."

So then, every civil law is composed of a mandate (—a command, an injunction, an imperative proposition, a dogmatical precept, a warning, a prohibition or direction—) and a sanction; the mandatory part having a moral element and a conventional element.

The latter may be also called, the civil, the artificial, the mutable, the local, the arbitrary, the human —element, incident or quality; each epithet indicating a characteristic not included in the indispensable, universal, or moral element.

The nature of Man—his faculties and his propensities—must determine the scope and application of Law: in other words, the motive, subject, operation of rules of conduct must correspond with, be within Man's sphere of action—a dogma thus explained by Domat:

"We cannot take a more simple and surer way "for discovering the first principles of laws, than by "supposing two prime truths, which are only bare "definitions. One is, that the laws of Man are "nothing else but the rules of his conduct; and the "other, that the said conduct is nothing else but the "steps which a man makes towards his end."

To argue upon, and to explain the end of Man, the purpose of Man's existence, is, to lay bare the foundations, to develop the structure, to illustrate the necessity and application of Law. In Man's steps towards his end, we know must be found every intermediate object and aim which consist with the purpose and end of Man's being: and it is the observation of an old English moralist, that, whatever is directed

in the shortest way to that end, may be called 'right,' as a right line is the shortest of all.

To associate and to form communities, to erect powers and principalities, to organise schemes of political and social action, to possess, to enjoy, to improve, to explore, to discover, to speculate—such are human aims and occupations, all tending to the end: for they are the natural results and promptings of Man's wants, and of Man's Reason; that Reason being influenced (not seldom clouded and impeded) by a secondary power, Man's will—itself but a result of motive forces.

Association—the union and concord of intentions, of aims—must, in action or operation, restrain something of the will of each individual in the union: hence, civil Law itself has been defined, 'the deliberate reason of all, governing the occasional will of each.' What each one is to have, not to have, to do, to refrain from, must be ascertained. To every grade and form of association, this rule and necessity applies and inherently belongs.

Political associations—primitive nationalities—are formed gradually and variously, discordant wills give way and combine, uniform action is authoritatively established, by degrees: that uniformity is civil Law, the result of collective sentiments, habits, manners —of convenience, of circumstances, in continued association. (b)

LIBERTY: EQUALITY.

It follows from, and is indeed but a paraphrase of the preceding sentences, that subjection to Law indi-

cates restraint and coercion—a uniform and compulsory progress, notwithstanding and in contrast with the ever-varying will: the Law's power is necessarily supreme and single, admitting of no rival, no interference. It is a primary characteristic of all Law, to define as well as to enjoin restrictions—to define and circumscribe, for each member of a law-directed community, a range of action; thus to preserve and protect the *common* weal. Without speculating upon the ideal (general and abstract) freedom or license of the human will, it is an obvious truth, that, the indulgence or exercise of that mysterious motive-power cannot, under any circumstances, have unlimited scope or range: its proper arena of action, as well as the faculties of its agents, must always be limited.

The terms 'liberty' 'freedom' represent a range of action, and have always a relative significance, *e. g.* in relation to the moral Law—to expediency or safety—to the economy and exigencies of civil society. In this last relation, liberty has a juridical meaning and value, and may be defined 'the range of action of social Man.'

"In governments," wrote Montesquieu, "that is, "in societies directed by laws, liberty can consist only "in the power of doing what we ought to will, and "in not being constrained to do, what we ought not "to will." (c)

He is free, he enjoys liberty, who knows no other check or trammel, in the exercise of his will, than Law, moral or civil; nor without constant general forbearance, can there be particular or individual

liberty. Admirably is this truth at once expressed and illustrated by Cicero,:—"For this it is we are "servants of the Law, that we may be free men." (d)

Thus, Law confers as well as secures freedom of action. That the security is but imperfect, must follow from the impossibility of preventing (which is something else than punishing for) results of the errant will and ways of men. So is Man constituted —the victim of his own mysterious and dangerous, though valuable, ennobling prerogative, free-will!

It is in this definite and significant view of liberty, that Kant defines *jus* (*i. e.* a juridical system of right), to be, "the aggregate of conditions under which "any one's freedom of choice (*arbitrium*) becomes "compatible with the liberty of others; conforming "to a general law of liberty." (e)

Man, the rational creature, has a conscious purpose, an intent, whenever he exercises his faculties. His own free-will, his own choice and option selects and determines that purpose. Law—moral and civil—may, indeed must, constrain his will, *i. e.* by the threat of sanctions or (in exceptional cases) by preventive coercion. But, there is a constraint which is a constant and normal infliction, leaving its victim without any possibility of choice, any use of his free-will, any discretion to do or not to do. One so subject, has not liberty; his will's choice—his *arbitrium* (a comprehensive name for all action of free-will) is not limited merely, *i. e.* by any limit as a result of some organised scheme of common subjection, voluntarily submitted to by moral agents—but

the domain of free-will is converted into a silent, barren waste: whilst Nature's privilege, to cultivate, to lay out, to improve that domain, is transferred (— control over that privilege is transferred), as an increment, to a particular external power, to a foreign *arbitrium*, whether of one or more—external, and therefore wholly irrespective of, needing no impulse from the rational or other motives of him upon whom it is thus brought to bear. Such an one is, a slave—the mere instrument of another's will. Being divested of free-will, of the exercise of his Reason to shape his intents or his conduct—being, therefore, without moral responsibility (in respect of his involuntary progress), he has lost his human supremacy—his manhood, at all events its outward characteristic; though, may-be, having the consciousness, as he undoubtedly holds the dormant prerogative, of a rational, morally independent, will.

Equality, in jurisprudence and in political science, means—the equal, unvarying protection of Law, to which each one is entitled. Men have equal rights, but to unequal things. The station, duties, possessions, condition, success, of individuals necessarily differ—a necessity as real and as rational, as the physical differences of stature, of colour, of temperament. What rightfully belongs to each, should be equally secured to each, by Law. (f)

The measure of what should belong to any member of a civil society, is the result, in each case, of an aggregate of facts, which indicate the condition and claims of the individual. Law does not create, but

enquires of and marshals those facts, under the several heads—*status;* contract; wrong. As the incidents and accidents of each one's civil position, are, under those heads, found to be; so must follow his civil advantages and claims, created or recognised by each jural system of rights, wrongs, remedies, duties, as hereafter explained.

(*a*) In every such instance, the wisdom or the error of legislative intervention—whether or not the particular interdict be within the sphere of civil Law—is demonstrable, by means of that great effort of modern progress (vaguely foreshadowed by Aristotle), the science of Political Economy. The rules of this science furnish a formulary test of legislation, and are in aid of the application of laws: they reveal the practical working and intrinsic results—while jurisprudence traces and analyses the gradation and history—of a people's laws.

(*b*) This view, while it ignores deliberate, *a priori* construction of a primitive polity, does not touch any theory of motives or incentives that bring men together. Bacon defined the aim of legislation to be, "that the citizens may live happily."—and Aristotle insisted that civil society was founded, not that its members might *live*, but that they might *live well;* repudiating the notion, that a State is "an alliance "mutually to defend each other from injuries, or for a commercial inter- "course." Aristotle thought individual virtue to be the normal aim and purpose of statesmen and legislators. But little research or reflection is needed to discover, that, methodizing, even knowledge of the legitimate uses and modes of civil association, are efforts of a society when organised, not preceding or during its formation. Instinct (or natural human tendencies), necessity, wants, emergencies, produce arrangements and relations, which mental effort, philosophical and scientific enquiry, in time analyse, investigate, and mature. Legislation proper cannot be the origin either of a State or of laws.

(*c*) The latent force of that seemingly simple proposition discovers itself in the following philosophical dogma of Kant:

"Liberty, considered with reference to the mental legislation of "Reason [—the moral sense], is, in truth, but a faculty [—a range "of action]: the possibility of wandering from [the precepts of] that "legislation, is but defect of power."

If a road to a certain goal be along the edge of a precipice, the possible accident, that a way-farer may, carelessly, rashly, or ignorantly, step over the precipice, can scarcely be included in the idea or description of his liberty to travel to that goal or on that road. So, in the path of life, the will or the physical faculty to transgress, to go astray, to fall —is a weakness, a misfortune, a defect, not an extension or effort of liberty, in any significant or rational sense of that term.

(*d*) In this account of liberty, no provision is made for the unrighteousness of any law, such as may excuse or, in plain obedience to a paramount rule, even warrant disobedience. A law, which the subject can have any righteous option about obeying, is exceptional; it is not a juridical, but a political (also a moral) dilemma.

There is another, and perhaps the most popular application of the word liberty, in which sense or use it has ever been a very tocsin of dispute and strife, and in which it admits not of definition, *viz.* the position to which the subject, under every or any government, is entitled, as respects freedom of speech and of action, as respects also, voice, power or share in every or any function of government. This is a problem—a different one in each case—of legislation, and of speculative politics.

Bentham, commenting on the 2nd Article of the French Declaration of Rights, of 1791, wrote:—

"We know what it is for men to live without government, for we see "instances of such a way of life—we see it in many savage nations, "or rather races of mankind; for instance, among the savages of N. S. "Wales, whose way of living is so well known to us: no habit of ob- "dience, and thence no government—no government, and thence no "laws—no laws, and thence no such things as rights—no security— "no property:—liberty, as against regular control, the control of laws "and government—perfect; but as against all irregular control, the "mandates of stronger individuals, none." Bentham ignored 'natural rights,' even in the constitution of the family, except as a mere consequence or inference from brutal *i. e.* physical force; therefore, he ignored domestic government, as 'regular.' This dogmatic view (more formal than real) does not affect the force and truth of his illustration of so-called liberty in the absence of civil sanctions.

(e) This is not the place to discuss theories formed upon an absolute, single, yet undefined meaning of liberty, *viz.* co-extensive with the possible indulgence of an ideal will. Every law, in that view, however traced and whence-soever it emanates, infringes liberty. Theorists of that school, although strenuously ignoring a code of

conduct antecedent to and irrespective of human systems, insist upon a 'natural' liberty; this really being, when analysed, an unnatural license. They cannot gainsay, that men have *not* liberty, as the feathered race have, to soar among the clouds, to ride aloft with the winds, nor yet to dwell with fishes in the deep waters—that men have *not* liberty to set at naught the universal *law*, that animal life needs for its support a constant, tedious process of eating and drinking: in this region, *viz.* of physics, a law is recognised—a natural law, one before and beyond human contrivances. But, that men are not naturally—irrespective of human devices, opinion, and prohibitions—*at liberty* to kill, to maim, to cheat their fellows, is, by the same school, considered an unwarranted and unphilosophical assumption!

The jurist regards only civil liberty, which does not need nor invite any speculative enquiry of a natural or præ-civil liberty.

(f) "It has been said, that *All men are born equal.* But it is "evident that this is not true as a fact. For not only are children, "for a long time after birth, necessarily in the power of parents and "others; but the external conditions of the society in which a man "is born, as the laws of property and the like, determine his relation "to other men, during life. If it be said that these are extraneous and "accidental circumstances, not born with the man; we answer, that "if we reject from our consideration, as extraneous and accidental, all "such conditions, there remains nothing which we can call intrinsic "and necessary, but the material conditions of man's existence; and "if we were to adopt this view, the principle might more properly be "stated, *All men are equally born.* The relations of Family, Property, "and the like, are as essential to man's moral being, as Language, "without which his mind cannot be unfolded to the apprehension of "Rules, and the distinction of right and wrong. If therefore our "assumed equality rejects the former circumstance, it must reject the "latter." *Elements of Morality.*

SECTION V.

JURAL SIGNIFICANCE OF RIGHTS, OBLIGATION, DUTY. HEADS, CLASSES, TITLES, EXPLANATION OF RIGHTS AND WRONGS.

"THE *conceptions* of the fundamental Rights of "men are universal, and flow necessarily from the "moral nature of Man: the *definitions* of these "Rights are diverse, and are determined by the laws "of each State." (a)

"Private Right lies under the protection of public "laws; for Law guards the people, and magistrates "guard the laws." (b)

Whatsoever a man may claim protection for, to be protected in, by appeal to Law and to the sanctions of Law, is his Right—lawfully his own, under guarantee of Law; *e. g.* life, property. Liberty (as defined in SEC. IV.) is rightfully claimable; therefore liberty may be designated a Right. But liberty is more scientifically classed as the entire aggregate or sum of each one's Rights. For, Rights are powers, faculties of action or of enjoyment, marking out, constituting each man's range of action: each man's Rights therefore necessarily cover the area of his civil liberty. A Right is, essentially, an idea of the future, *viz.* the continuance of what is, or, the assured coming of what might or might not come to pass. (c)

The respect, restraint, conduct, imposed, by law, on every one, with regard, in relation to every Right of every other one, is, in each instance, an obligation. So that, each one's liberty is bounded and defined by a wall, a hedge-row of obligations; beyond and close

*

upon which, on all sides, are the several, separate domains of others' Rights—all other areas of liberty.

The obligations of moral Law are called, as such, emphatically, duties; being what is due to Reason, to Nature, to God. Therefore, in so far as any scheme of civil Law is, probably (though perhaps not critically nor precisely) in consonance with the universal code—in so far as obedience to civil Law is an alternative refuge from confusion and lawlessness—to such extent (at any rate), such obedience is a paramount and moral duty.[d] The word 'duty' is also used generally, as a synonyme of obligation; moral duties, legal duties. However undefined, even vague or conjectural, the ideas of mutual Right and obligation, in a primitive polity; still, civil rules of Right and obligation must always practically exist. Every emergency, every phase of relation and of collision—whether creating, exhibiting, or infringing Rights—is provided for. Experience and civilization mature the rational and skilled understanding, adoption, formation of a scheme of Rights and of their infringement: but, as the rudest polity must contain an adjudicating function—as no association, professedly (however rudely) organised as a polity, can exclude any possible contingency that may call for a rule of decision upon Right and obligation—as the occurrence and development of commerce, of modes of dealing, of oppressions, of mutualities and antagonisms, depend not upon Law or civil rules; but, as already explained, Law is called into exercise in order to give those

inevitable results of Man's propensities and wants, scope, limit, or check, adapted to the exigencies of civil life—it follows, that, Rights and their correlative, obligations, are implied, to an indefinite extent, in every grade and kind of polity. It also follows, that the knowledge, the precise demarcation, the minute tracery (as it were in a network) of civil Rights, progresses with the progression of a people, in the arts and improvements—in the intellectual culture—in the combination and fixedness of purpose—that characterise, more or less, all civilly-social existence. With respect to formal or express legislation; it is clear, that definition of Right enters into every enactment or promulgated law. One object of every complete legislative act must be, to guard against the infraction of a Right; and, in so far it must, in some way, define, create, or affirm the Right treated of [e], determining, within the purview of that particular law and as the legislative judgment, the national conscience there wills, what is right and what is wrong.

No enquiry, then, can be more germane or more essential, in the study of jurisprudence, than, what are or may be Rights civilly protected—jural Rights, their qualities and incidents.

Every violation of a Right, is, a Wrong; and, being a negation of, or opposed to *jus*, it is an in-jury.

REMEDY.

Compensation for, reparation of the loss occasioned by, wrong and injury, is every man's Right.

"Now, since," wrote Heineccius, "whatsoever ren-"ders another more unhappy, injures him; but he "renders one most unhappy, who, having injured "him, does not repair the damage; the consequence "is, that he who does a person any injury, is obliged "to make reparation to him; and that he who refuses "to do it, does a fresh injury, and may be truly "said to hurt him again."

This Right may be defined—restoration, actually or virtually, to the state of things existing before —rather, which would have been but for—a Wrong done (*i. e.* to the *status quo*), as far as possible. To protect, to enforce, when due, (thus giving a value to) every civil Right, Law provides a remedy—a method of pursuing the wrong-doer, of verifying and of obtaining the Right. Hence, the Law maxim, 'Every Right has a remedy'; Right and remedy being cor-relative terms.(f) Thus, breach of some law, infringement of some civil Right, necessarily precedes exercise or defined existence of the Right of remedy; which, until such breach, is merely potential and contingent:(g) it is a Right that accompanies or supplements every other civil Right. Remedy is the indicator, the witness of Wrong; it is the road or means of attaining to, as well as a test of the particular sanction, which the Right, the rule of Law violated demands. Pursuit of remedy leads, in the first instance, to a new, defined Right and legal claim, *viz.* adjudicated restoration —which term includes the restorative equivalent, compensation. If the payment or other act of repara-

tion decreed, be resisted, then the sanction applicable is enforced.(*h*)

PERSONAL SECURITY: PERSONAL FREEDOM.

Civil Law must always protect—guarantee immunity from harm to, the body, the person—each one's self. Detriment to, interference with, active assumption of power over the life, the physical or the mental condition of a fellow man—gratuitously and without necessity, moral or civil—is, universally, a Wrong.

Wounding, striking, unauthorised personal trespass or restraint of any sort, acts directly causing damage to health of mind(*i*) or of body, illegal meddling with mental or bodily action—such are infringements of personal integrity and security, the first of substantive Rights.(*j*)

Our Indian Penal Code protects all classes of subjects, whether Christian, Hindu, Mahommedan, Seikh, or of any other creed or denomination whatever, in rational exercise and expression of what each may hold to be—Religion; by punishing taunt and ridicule of religious feelings.(*k*)

By such treatment of intolerant and rude disregard of solemn and valued convictions—even, may-be, of popular credulity—the personal civil Right to independent thought, in a wide and most important (perhaps the highest) range of mental activity is recognised and vindicated.

All laws imposing restrictions upon expression or communication of thought (*e. g.* censorship of the Press), range under this head; inasmuch as they pre-

scribe and define the subject's personal liberty in a particular field of thought and action.(l)

SELF-DEFENCE: PRIVATE COERCION.

Nor, is State or jural protection confined to applying remedies and sanctions, in their ordinary acceptation, *i. e.* as a cure or consequence of wrong. The Law should prevent and resist evil, as well as repair and punish. A threat, accompanied or conveyed by attempt or gesture of violence, itself confers a Right adapted to the necessity of the case. Self-defence is that Right, as well as the expression of that necessity. The defender is, unavoidably, an instrument of the Law. The imminent danger of the aggression, which, if continued, may be irreparable, places the party attacked in an exceptional position; which releases him from his general obligation to respect every one's person and to abstain from personal violence. The immunity guaranteed by Law, is not to be converted into a weapon or opportunity of violence, nor a means to aid and promote violence; the attempt so to use it cancels, for the occasion, the violator's general Right: the shield or *ægis* of Law drops, vanishes.

The same rule and reasoning applies to protection of any Right, *e. g.* possession, wherever a similar necessity, *viz.* for the threatened party to act as an instrument of the Law, exists; the emergency precluding recourse to tribunals or public officers. Just as contract (it will be seen) creates an occasional law and obligation, *viz.* to observe the terms of the

contract; so, violence or attempt of violence, in each case, creates, gives birth to a new Right, of resistance, coercive repulsion, self-defence—a Right enforced, not through the active interference of Law, but by an exceptional permission, by withdrawal of a general prohibition.

These are not only juridical rules, but a part of natural Law; contradiction of which would be an act of oppression, not of Reason: for, State-coercion is but a civil substitute of the inherent natural Right, self-protection.

The aggression which warrants disregard of another's general Right of personal security, is not confined to aggression upon oneself. Right of resistance must be co-extensive with the duty, the obligation and the Right of protection; for, wherever Law declares any Right or imposes an obligation, all acts and power necessary for efficient exercise and performance thereof are delegated, as of-course. Moreover, wherever the public weal, the general peace of the community, *e. g.* prevention of heinous crime or of clearly wrongful violence, calls for private interference; there, such violence, such vindicatory coercion as the occasion morally justifies, come under this head of Right.

The English Courts have supported the Right of protective coercion, in defence of a child, a wife, a husband, a relative, a servant, an apprentice, a friend, a neighbour.

This Right, has an obvious attendant risk, *viz.* he who assumes to exercise it may mistake the occa-

"rights, capacities, and duties, or those incapacities "and exemptions, are considered as forming or "composing a single though complex being, and are "bound into that complex One by the collective name "'condition.'" Rights of status necessarily vary and multiply with the social, commercial, official, artificial relations, created or recognised by each system; active disregard of which are, in that system, civil personal wrongs. Depriving a father of his child, a husband of his wife; injuring either father or husband through personal injury to the child or wife; illegally and maliciously alienating customers from a tradesman, clients or patients from a lawyer or medical practitioner—such are obvious instances of injury to status.

With respect to the status, the relative rights, created by State-offices, as of judge, magistrate, military commander, &c; interference with those rights—*i. e.* with execution of the duties assigned to the offices respectively—although it must involve personal indignity and cause for individual complaint, is an affair of State, a crime; since, the primary and most material injury is, to the public, the nation, whose service and welfare is thereby marred or trifled with. But, the officer may, by some fraud or machination, lose his office, or his hold upon the confidence of the public, the estimation of his superiors. Here would be private and personal wrong or damage, by means, through the channel of his official status.

Most frequently in such cases, status and special

characteristics are rather a criterion of the amount of damage done, of loss to be compensated, than of a distinct injury: inasmuch as the wrong complained of is a violation of an absolute—of a direct, as well as of an artificial or relative Right; *e. g.* defamation, illegal deprivation of property such as profits or income.

RIGHTS OF FAMILY.

The members, components, of a family, have reciprocal rights, as such—rights of that status, *viz.* of parentage, filiation, blood-relationship. The primitive, universal, and paramount character of this class of rights give them a special significance: they stand in relief among status-relations: they constitute primary society, the basis or commencement of all civil union. As the paternal typifies all dominical and imperial control; so is there found in the filial and fraternal ties, the type and precursor of civil subjection and of civil forms of fellowship. Civil Law often deals arbitrarily, at all events very variously, with the marital and the parental instances of this class of status-rights; in the character, and duration, and evidence, of paternal authority; in all incidents of the marriage tie—in its very idea and definition. The subject is treated at length in a separate section.

GOOD-NAME: SELF-RESPECT.

Reputation, character, is the life of life, at once the attractive and the repulsive medium of our social mingling—the lustre or the bane of each one's

social existence. It is the 'reflex sentiment' (so named by Dr. Whewell), consciousness of which determines the worth of all that life can give, to the large majority of mankind. It is a second self. Obviously then, to lessen, to lower, without warrant of Law, the reputation, character, existimation[r] of any-one among his fellows, must often be a serious social and civil grievance. Hence, laws of defamation, slander, libel.

Good-name is a moral reward, therefore a moral Right, and, in one shape or another, always vindicated by civil Law. Like to sale-price of a marketable commodity, fair repute or good-name fluctuates, but it is a normal result, and the integrity of the premises which produce that result (as with price) is of vital consequence to all. Therefore, Law provides, that the market be not tampered with.

But, in order to earn, to have a title to good name or repute, in other words, a claim to respect from others, there is one intrinsic motive and personal sentiment imperatively needed, *viz.* self-respect[s]; the integrity and preservation of which is therefore a Right, and, as an action of the mind, may range under the Right of security: yet, it is also in close alliance with the Right to good-name, whenever this is earned or sought.

To make an insulting speech, may—and that, merely in respect of personal dishonor, of wounded feelings,—infringe a civil Right: for, the sentiments, the manners, the civil content of a people, may

require so nice an estimate of personal immunity. In the *Dharma Sastra;*

"If any give abusive words to a deformed or dis-
"eased person, whether the words be true or untrue
"or in the form of irony, he shall be fined—"

The Penal Code of British India treats as an intrinsic civil Right, the mental modesty—also the (oriental) seclusion of women: any violation of either is a crime.

History tells, how insults have been, Law approving, wiped out with blood. The historian of Sweden (Geijer) quotes an old law of those famous northern tribes,—"that, whosoever upbraided another, as not
"being 'a man's match nor a man in his heart,' should
"render himself to do battle with the man he had
"insulted, at a spot where three ways met. If the
"person against whom the words had been spoken
"came not to the meeting, it is said, then must he
"needs be such a one as he hath been called, and
"can never again bear valid testimony, nor take oath.
"If the person who spoke the words came not, he was
"to be publicly proclaimed infamous (*niding*), and a
"memorial of the fact must be erected at the spot."(t)

PROPERTY.

To have, to possess, to use—these are terms indicative of property, a natural institution, one of primary society, found in, because essential to every stage of society; however improved, modified, analysed and built upon by civil laws.

In the simplest association, if mankind but co-

existed without associating, something or the use of something must be an individual's own, entirely or for a time: this is necessary to any enjoyment of life, to life itself—and this is 'property.'

What is one's own, the interference of every other is excluded from: this is the essential condition of ownership. Exclusion is then, the generic, the fundamental idea in property. Men are associated in order to enjoy the common birth-right of mankind, the Earth and the things of Earth. The Author of the Universe, by giving that birth-right and heritage in common, effectually decreed and compelled association: association necessitates rule and method and mutual forbearance (*supra* p. 32).

Its necessity being established, what is the medium or the criterion of appropriation, of property? The answer is,—occupation, labour. By 'occupation' [u] is meant, the act of a first taker, the effort to appropriate; which act and effort, if continuous and sustained (as must be assumed), include labour. [v] Eastern codes have expressly recognized industrial labour [w] as a basis of property:—

MANU—"Sages, who know former times—pronounce "cultivated land to be the property of him who cut "away the wood, or who cleared and tilled it." And from the *Sheraa*—"He who brings into life "land which was dead, he is the owner thereof."

Such is the character and origin of this Right, as a necessary mode of enjoyment or benefit. Its jural significance, its guarantee, must of course be from Law: and in this sense one may understand

Kant's dogma,—The notion of a 'mine and thine' external to self can have no existence save in the social condition, *i. e.* in civil society or union—not as a confusion or identification of the primitive 'Right of all' with the distinctive idea of property.(x)

Regarding property as a rule of enjoyment—a preventive of, a safeguard against confusion and dispute among men, it may well be contended, that, where dispute is not physically possible (as, where duality of claims cannot be), there, property is not possible, at least in a civil sense.(y) Variety, modes, divisions, disposal of proprietary rights—depend on the methods and policy of each scheme of civil laws: *e. g.* feudal, zemindary, copyhold, labour-rights in land; the several rights and modifications of property as, hirer, pledgee, factor, custodian, general owner where there is a pledge.

Grotius says—"Formerly, when concurrence of the "entire race of men was practicable, partition was "a mode of original acquisition—now, it can only "be by occupation."—and elsewhere, "Thus we learn "how *res* came under proprietorship: not by a "mere act of the will; inasmuch as strangers could "not know what any might desire to be theirs, so "as not to meddle with that; moreover, many might "have desired the same thing—but [property came] "by pact of some sort, either express, as by parti- "tion; or tacit, as by occupation. It is to be sup- "posed that, when enjoyment in common became "distasteful, but formal partition was not yet made, "it must have been unanimously agreed among all

"that, whatever each one had occupied, he should "have that as his own."

Purely original acquisition of property is, to the jurist, a mere speculative enquiry; inasmuch as every system of civil laws must apply positive rules to determine the ownership of all *res* (things) within their dominion; even those seemingly derelict. If unappropriated land be without the territorial sovereignty of any State, the first efficient occupant, by his acts of occupation, necessarily brings the new acquisition under dominion of the laws of that State and sovereign to whom he owes allegiance; and those laws clothe the new territory with a definite character and quality, as a subject of property.(z)

For, the political status of the acquirer invests him with a representative character, whether he will or no: he carries that status with him everywhere; nor can he acquire, in any place, any rights, but in subordination to the laws of that society of which he is a unit. This is a necessary deduction from the relation of sovereign and subject, *i. e.* political supremacy.

COMMON PROPERTY: PUBLIC PROPERTY.

It is obvious, that many things which are the heritage of mankind, which Nature has spread and preserves for Man's sustenance and enjoyment, are incapable of specific appropriation.

For the same cause that many things, as, land for habitation or cultivation, food for consumption, must be divided and entirely appropriated, to be

of use to, to be available by individuals, *viz.* that no other mode will answer the end—for the same cause it is, that the air we breathe, the sea, the sea-shore,[aa] are obviously impossible of rationally exclusive appropriation; inasmuch as their very use, their advantage implies, that they are *general and common at all times to all mankind:* which condition itself specifies and defines the entire class of such things.[bb] Were it otherwise, the liberty to appropriate (where physically possible) in such cases once admitted, the appropriators must lose much more in what they are excluded from, in the deprivation consequent upon such liberty, than their own appropriation could possibly compensate. This truth is ratified by universal consent; it is a corollary to the juridical theory of liberty.

Just so, certain edifices, roads, &c. within the territorial limits of each particular State, are and must be, *common and public to all its subjects; e. g.* buildings for public worship, for public entertainment, highways (whether of land or water).[cc]

ACCESSION.

Property, besides its use and significance as a sharing, an apportionment, a plan for enjoyment of the estate of the human species, this Earth and the spontaneous gifts of Nature, applies also to the product of labour, (not the labour of occupation and appropriation merely, but) that which is fabricated by Man, the fruit of industry. Man cannot create, he can but improve, and extract utility from the

works of Creation, by labour. Here is an indisputable basis of property, of exclusion, of preference in enjoyment. Difficulty however may occur with reference to the material upon which the industry, the skill is employed; *e. g.* agriculture and horticulture, architectural structures, sculpture, painting. If the labour and skill which have produced the cultured field or the work of art, be the property of A, but he has, wilfully or unwittingly, worked upon the soil, the marble, or the canvas of B; there is a confusion of rights: these must be disentangled and apportioned by positive conventional rules of civil Law. The dilemma has given occasion to casuistical ingenuity. Heineccius thought:

"Seeing a master has a right to exclude all from "the use of what is his, he has a right certainly "to hinder any thing from being joined to what "is his against his will. Wherefore, since what "is added to any thing of ours, either renders it "useless, or at least worse, or renders it more "valuable and better, because he who renders our "goods worse hurts us; the consequence is that he "who has rendered our goods either useless or worse "by an industrial accession, is obliged, taking the "spoilt goods, to repair our damage; and if he did it "by deceit, and with evil intention, he is likewise "liable to punishment. But, if our goods are ren-"dered better and more valuable by any artificial "accession, then there is a great difference when the "two things can be separated without any considerable "loss, and when they cannot. In the former case,

"since the master of each part hath a right to exclude "all others from the use of what belongs to him; "but that cannot now be done otherwise than by se- "parating the two things; the consequence is, that, "in this case, the things are to be immediately separat- "ed, and to each is to be restored his own part. But, "in the other case, the joined things ought to be "adjudged to one or other of the two, the other "being condemned to pay the value of what is not "his, to the owner who is thus deprived of it; and, "if there be any knavery in the matter, punishment "is deserved."

The Mahommedan Law doctors, looking upon an unlicensed industrial accession, *i. e.* such an one as changes the character of a thing, as an ousting of the owner—usurpation (*ghæsb*), assume, as a rule, a change of property, and substitute the right of compensation: but they have among them much ingenious variety of opinion, and varying rules for varying occurrences.(*dd*)

The Roman Digest teaches: "When one out of "another's materials fashions something for himself, "Nerva and Proculus are of opinion that the fashion- "er is the owner, inasmuch as that which is fa- "shioned, had not appertained to any one. Sabinus "and Cassius think it more carrying out Nature's "rule, that he who was owner of the material be also "owner of what is fashioned from that material, "inasmuch as without the material nothing could "have been fashioned————But the opinion of "right-thinkers is between those two, *viz.* if what is

"fashioned can be reduced again to the mere material, "then what Sabinus and Cassius hold is the more "correct doctrine; if it be not capable of such "reduction, then the doctrine of Nerva and Proculus "is more correct—"

The result, in principle, and as the solution of a problem in jurisprudence, is, that the adjustment of loss and gain from industrial accession, must be made by each scheme of civil Law for itself, according to the views and convenience of each particular people.

Natural accretions; as alluvial deposit from a river, increase in growth or production—flowers, fruits, offspring of animals—all such seem naturally claimable, as necessarily and primarily acquired by the proprietor of the principal land, trees, animals, &c. of which they are severally the increment or product. But this class of accessions also need to be ordered and subdivided by artificial rule: *e. g.* the Roman system was,—'If an island rise in a public river (not in the sea, for then it belongs to the occupant), and become fixed in the middle of a river, it is in common to those who possess the land nearest to the bank on each side of the stream, according to the breadth and length of each frontage. If it lie nearer to the frontage of one estate on either side than to that of the other, that inheritance or estate has as many more feet or yards in the island as it is nearer to it. But if the whole island is nearer to one estate than to the other, that estate claims the whole. This is to be understood where the lands on each side have not any certain limits

and bounds; for if they have, there can be no claim or title to such an island, but it belongs to the occupant. If the river divide its course, and make an island of land by uniting its stream afterwards, or shall overflow a ground, that land does not belong to any occupant, or to the neighbouring estates, but to its first owner. An island rising in private rivers and lakes wholly belongs to the private persons who are owners of those lakes and rivers.'(oo)

RIGHTS WHICH ARE FRACTIONS OF PROPERTY: USE, SERVITUDES.

I have treated the Right called 'property,' broadly and simply, as a relation between a person and a thing—a power over and in respect of a thing—understanding by 'thing', whatever substance may be appropriated. But it is obvious, that the relation cannot be merely corporeal or material. All rights are jural ideas and dogmas. And these, when included in or a consequence of property, are in great part, as already observed, conventional civil creations. But, however various in form and significance, the generic character of all rights whatsoever, that are incident to or growing out of property, admit of classification.

Austin defined ownership or property:—"the "right to use or deal with some given subject, in "a manner, or to an extent, which, though it is "not unlimited, is indefinite."

A nearer approach to an exhaustive description of personal dominion in and over the materiel and products of Earth, or whatever may be property,

seems to be—'Full property, as a private civil Right, is; the union and aggregate of all civil rights in and over and in relation to a thing, excepting and exclusive of the State's Right.'

The exception refers to the *dominium eminens* (eminent domain), a paramount power in the sovereign, or collective political body—a power variously limited and defined, but inherent and indispensable —to interfere with or to supersede private Right, in protection or furtherance of the common weal; *e. g.* enforced purchase, for public purposes (as a road, a hospital), of a private estate. This public Right will be presently treated of.

There is another use of the terms, property, proprietor, owner, *dominus—viz.* with reference to a portion only of the rights of enjoyment and control included in either of the definitions given. Of those several *jura,* one only indicates or is typical of *dominium ;* and that is, what the Romans called *jus abutendi* (a Right to use up, to make away with), *i. e.* power to dispose of, as well as to alter the substance and identity of, the thing—to deal with it by jural transfer, or by destruction, change or conversion of the subject matter. This it is, which distinguishes the general owner from the owner of a fraction or an incident of property, *e. g.* a hirer. Terms signifying ownership are commonly applied to the relation indicated by a Right, however limited; as, the proprietor of a way, of a toll, of a fishery, of a Right of pasturage, of a license to kill game. Every relation between a person and a subject-thing is a mode of real Right or Right

in re, and therefore, a mode of property, giving, to the extent and compass of the individual or determinate relation, a power to exclude. And jurists distinguish between a dealing with the actual subject itself, *e. g.* driving a horse, enjoying the shade of a tree, dwelling upon land—to which they confine the term 'use'—from profiting by what comes from, *i. e.* the produce of the subject, *e. g.* the horse's foal, the tree's fruit, corn or rice from the land: such profits are *fructus*, material products or gains—either civil and artificial, as money for hire of an animal—or natural, *viz.* the animal's offspring. The distinction is from Rome, and is an arbitrary limitation of the comprehensive *usus*, which means, colloquially and intrinsically, turning to account, having the advantages of, dealing with.(ff) In a kindred science, Political Economy, 'utility' has been defined, 'the capacity of a thing to satisfy a desire': 'to use,' 'using,' is, in that view—the satisfying a desire out of or by means of a thing. Merely looking at some things is using them, *e. g.* pictures and other similar works of art; but, to be seen, is the only advantage (or means of advantage) such can yield—the end therefore, primarily, of their formation and existence. Not so with what exists for more practical ends, and does not in any way exhaust its purpose by being seen, *e. g.* a steam-engine, a loaf of bread: and dealing with a thing, to be a jural use of it, must be an efficient dealing—a dealing which is, in itself, an end, something gained, not a mere inchoate and intrinsically ineffective proceeding, as

taking a loaf in the hand before and in order to its being eaten. If the loaf be restored to its place, put down again before any portion of it is eaten; the loaf has not, at all, been *used*.

The loaf belongs to a class of things which jurists call fungible, *i. e.* functionable; one loaf may, ordinarily, represent, do the function of any other loaf of the same sort. And this must be so with whatever things are consumable, or got rid of by mere using; in other words, by applying them to their legitimate purpose, their being put to use: such are, each species of edible things, current coin. They have not, as a rule, individual significance, but are estimated in classes or species. It may be said generally of fungible things,—their use is their consumption, natural or civil, *viz.* food eaten, money spent.(gg)

A fructuary may be another than the usuary—the possessor or the usuary may have to surrender the whole or a portion of the *fructus*. This is the case with every subordinate or tenant-occupant of land who pays 'rent'—who, in other words, yields up a portion of the product or profits of cultivation to his landlord. Nor is a Right to use, identical with the possessory Right; the usuary holds, subject to his own special interest, for and as representing him who has the general possessory (holding) interest *extra* the separated use. And certainly, a fructuary is not necessarily either possessor or holder of that which yields his *fructus*.

The two rights joined, are usu-fruct, which must usually include the right to hold, as an incident or

means of using, but does not signify nor indicate a larger possessory interest than belongs to him who uses. Other distinctions have been drawn of rights coming, generally, under the head of 'use.'

English Law has 'easement,' which is, some Right, some special enjoyment and comfort, conceded, to the Public generally, or to a neighbouring land-owner, as a burden upon the estate of him who makes the concession. He is therefore obviously curtailed, so far, in his ownership; for he is under jural compulsion to permit or to forbear from something—a permission or a forbearance inconsistent with that universal exclusion denoted by complete, unbroken property.

Thus, in Roman Law, easements and certain other powers in or over land, were called 'servitudes,' in token of the ownership or dominion being, to the extent of the outside Right, subservient to another than the general owner.

It appears, that property is not and cannot be an abstraction: it must be connected with possession or with use, mediately, contingently, potentially, or actually and directly. So may be said of all rights severed from the full dominical power (of using, fruition, disposition) which is expressed by 'property,' *dominium*. A Right to drive or to walk over a neighbour's field, a Right to pluck fruit from a neighbour's orchard, a Right to drain water from your own cultivation through your neighbour's—those valuable rights are, as rights, intangible: but, the Right of owning a house, a

field, a horse, is, in like manner, intangible; it is an idea, a potentiality; differing from the three rights first named, in extent, in degree, not in kind. A juridical distinction has been adopted from the Roman jurists, who distinguished claims or rights over or in a subject of property, but which are severed from the larger Right of ownership—dominical title—also from Right of possession, as of a different class, 'incorporeal.' True it is, the one description of Right is not so substantially represented as the other; it lies, practically, in the conduct and forbearance of the (so-called) proprietor or possessor: but, this is a circumstance merely, accidental, not a jural difference, and affects, not the character of the Right, but the facility of its enjoyment or exercise. In each case, the *corpus*, the substance, the land which furnishes the Right, is the essential, the one indispensable element or incident; separating the entire class of such rights from a Right of conventional obligation, which is represented, solely, by the conscience, by the moral will of the person bound, and which therefore is an abstraction, something incorporeal.

It is certainly questionable, whether rights of property are scientifically distinguished, as to their character, extent or compass, by the limit of time —duration; which seems to be an accident,—an external or collateral circumstance—not a quality. An estate of which there is full power of enjoyment, for life or for years, is, intrinsically, complete, as an existing right of dominion, notwithstanding the apparent resolutory condition of time. If,

however, the limit of duration include a curtailment of the powers of use, of taking the produce, of actual disposition *(jus utendi, jus fruendi, jus abutendi)*, then, the Right itself is, to that extent, curtailed; but not by reason of the restriction of time. The most liberal transfer of mere usu-fruct must differ from full property, from a purchase out and out, in this, *viz.* the absence of a power of altering the substance or of changing the mastery of the substance. So that, the ordinary expression of a limited duration (which, intrinsically and rationally, must be, in some form, an inherent condition of all ownership), is found, when analysed, to include and imply absence of some portion of full dominical power. The most absolute usufruct is but a 'servitude'; the most unqualified *possessory* Right, is but a fragment of 'dominion.'

On the other hand, the English 'fee-simple' land-owner has full property; and yet, his power of posthumous disposition is limited—in other words, the operation of his power of control is not perpetual. *(hh)*

POSSESSORY RIGHT.

It remains to speak of possession as a fraction of proprietary dominion—as a Right, and a jural fact, irrespective of the merely physical or material relation which the term 'possession' colloquially indicates. "For what," asks Austin, "is possession (meaning legal possession) but the *exercise* of a Right?"—that Right being a jural relation, a cause of having.

The etymology of possession has been variously deduced, as, from *posse* (to be able, to have power), from *positio* (placing, fixing); each origin leading to the simple colloquial notion of, having or holding. Kant repudiates the physical relation 'in space and time' as having any thing to do with the juridical idea of possession: *viz.* "A tract of land is "not mine, as a thing external, because I occupy it "with my body (for my liberty to occupy it is not "here in question, but the internal conception of "Right), but, if I remain the possessor of the land, "when I move to a distance from it, then the sole "question is the 'mine' of external right; and to "argue that my constant presence on the spot is a "condition of my ownership, is to maintain, either "that it is not possible to have anything external as "one's own, or that one must occupy two places at "once!"

External rights may be relative and comparative; juridical possession may exist against one, who is under an obligation to recognise and respect it as a Right, and not against another, whose servant or agent or deputy the holder, the ostensible (though vicarious) possessor may be. Moreover, physical possession or holding may be contentious and contestable, juridically, in a two-fold sense.

If a wrongful holder do not set up right, but might; if he ignore or defy the notion of any civil appropriation having been made of what he holds; asserting his own will or desire merely, for a cause of possession—his only relation to the thing held,

consequently to *bonâ fide* claimants of the possession is, as violator of the Law; and he is pursuable as such.

But, if the holder, although wrongful, believe in his own juridical claim, honestly (as far as appears) contending, that he has a Right, of any kind, to hold, either generally or against a particular adverse claimant; then, his position deserves respect, however fallacious his views and claim. He is an honest possessor; the non-possessor must prove, as well as assert in a juridical manner, his abstract Right, his 'title.'

Hence the popular adage, 'Possession is nine points of the Law:' it is, however wrongful, a juridical fact, and is protected by a Law dogma or postulate, which identifies unquestioned possession with full property, and, apparent possession with probable property. The wrong, if the fact of possession be one, concerns only him whose Right is interfered with—a Right, which the Law must undoubtedly vindicate, when informed, by proof which supersedes and outweighs the apparent fact, the semblance, similitude of Right, *viz.* mere possession, and displaces the inference—dissipates the false colour of ownership arising from it. To require such proof is the Right of the actual present possessor. Extent or character of proof is a distinct question. Adverse proof is a contest of antagonist forces; as one position is lost, new ground may be taken up: it is a matter of procedure, of the logic and machinery of litigation.

EXAMPLES OF ANALYSIS OR RESOLUTION OF PROPERTY.

Such is an analysis of 'property,' which, generically, indicates and expresses adjustment and division in enjoyment of things. I have shewn it to be a concrete or compound idea, capable of resolution. Titius owns a horse: for one or two hours of the twenty-four, Titius rides or drives the horse, which, for the remaining hours, is in the keeping of Marcus; who has contracted with Titius, to feed and lodge his horse—in consideration (*i. e.* taking as a remuneration) that Marcus is at liberty to employ the horse when not required by Titius: Quintus hires the horse from Titius, for a month, to ride and use, without disturbing the arrangement with Marcus: Titius sells the horse to Caius, to be delivered when the month of Quintus is expired. Now, after the sale, and during the month, no less than four men are separately and distinctly interested in, and have differing juridical relations with the horse, and with each other; each interest being an off-shoot or fraction of the ownership or *dominium*, which at first was simple and entire in Titius. Here we have,—present limited ownership and jural possession in Titius; deferred ownership in Caius: use in Quintus; custody and conditional use in Marcus.

Again; suppose the owner of sheep to have sold two shearings of their wool to A, and the product of two lambings to B, but to have let, in the meantime, the benefit of the flock's grazing (*i. e.* clearing the grass off and manuring a lawn) to C: here, the

possession must be with C, who must permit A (proprietor of the wool) to shear, and must surrender the lambs to B; and *then* the owner may dispose of the sheep. C had a partial *jus utendi;* A and B certain *jura fruendi* (as to different products); the contingent *jus abutendi* remaining, as the badge of dominion. Sub-divisions of interest—of Right—may be multiplied, by continuing the resolutory process, the analysis and separation, the multiplication and dividing, of the attributes and advantages of complete, exclusive property, —entire, undivided dominion, over a thing.

The word 'interest' is a common indefinite term used in describing modes of right to possess or to enjoy; 'possessory interest,' 'usufructuary interest,' 'proprietary interest,' 'disposable interest,' 'alienable interest,' 'hereditary interest'—all or either of which may or not be conjoined with the fact of holding; a fact, in itself presumptive of every interest in the jural holder.

The thing or subject possessed is called 'a possession': so, the subject of property or proprietary interest, is called, 'a property;' and, if in land, 'an estate'; the last term being also, and more correctly used as synonymous with 'interest,' *e. g.* hereditary estate, life-estate, estate for years.

SEIGNORY: EMINENT DOMAIN.

The notion of property altogether disconnected from present or future Right to possess or to use, has been

a device of military or despotic rule; it is a refinement—the product of an artificial and non-natural state of society and manners.

Such ideal, detached, nude proprietary claim is, when analysed, rather a personal than a real relation, and may be described—a relative lordship, mastery, dominion over the owner of a thing, *in respect of his ownership*, where the claimant of the seignoral Right or relation has no Right or power whatever (usuary, possessory or otherwise)—nor expectation of any—in or over the thing itself.

We might suppose a patriarch thus portioning members of his family, and reserving some paramount power to interfere; while he separated and gave up the actual and beneficial enjoyment of landed or other family possessions.

The feudality of the middle ages of Europe, at the period when fiefs first became hereditary, affords an instance of this anomalous *quasi*-proprietary relation.[ii] When the relation includes or entitles to any substantive benefit, as, surrender of any produce, rent, perquisites (absolute or contingent); then seignory is but an ordinary property-right, an incident of status or of contract.

More practical and significant is the 'eminent domain' (alluded to *supra* p. 60), an imperial right or power, of which seignory would seem to be an offshoot or imitation.

"To kings belongs *potestas* [political dominion] "over all; to private men, property." "The country

"is the State's; but, not the less, each one possesses "therein his own." (kk)

"Private property," wrote Kant, "can belong to the "subject people alone—and this, not collectively, but "distributively."

'Eminent domain' is one of a class of juridical rules—political laws, designated, or included in the term, *imperium* (empire).(ll) It is that sovereign interference with, supervision and pre-eminence over mere individual rights, which, according to the policy and constitution of each State, attaches to its several governing branches: *e. g.* in England, the great and multifarious powers of the royal prerogative, the usages and privilege of parliament —in India, the universal and paramount pledge of private estates for revenue. The most ordinary and valuable private rights are thus seemingly infringed, *viz.* in lawful exercise of the *dominium eminens*—of the *imperium* vested, presumably for the good of all, in him or in those who represent State-power. The exercise of such public and paramount control, is therefore an exception to every private Right.

In States where the administrative function of Government as holder of the public purse, is not controlled by any direct representation of the possessors of private property, all taxation and revenue imposts may well be classed under the head 'eminent domain'; for taxation has been correctly defined, in general, 'appropriation of private property for public ends.'

GOOD-FAITH: RIGHTS OF CONTRACT.

Need it be said, that good faith—truth, is the condition, the bond of human intercourse?

"Our intelligence being by no other way to be "conveyed to one another but by speaking, who fal- "sifies that, betrays public society; 'tis the only way "by which we communicate our thoughts and wills; "'tis the interpreter of the soul; and if it deceives "us, we no longer know, nor have any other tie upon "one another. If that deceive us, it breaks all our "correspondence, and dissolves all the ties of govern- "ment."(*mm*) Speech is the specially-human instrument; but, every act, every mode of development of will, every omission as well as commission that may in any way affect a fellow-man, is good or bad, right or wrong, in proportion as the will (the motive power) is honest—is earnest in intent to do right.

Good faith, as generating and justifying mutual confidence, is the basis and indispensable element of all contract, convention, commerce: but the civil import of good-faith, as an inherent social necessity, generically and not merely in conventional dealings, is much more wide and comprehensive; that import being, fidelity of purpose, circumspection, practical sincerity, fair dealing, active right-mindedness in every legal relation, in every jural act. To be treated in good faith, is therefore a substantive Right; and will be enlarged on, when I come to phases of wrong, many of which are but a negation of active good faith, of an honest and circum-

spect will. A Right of contract means, a Right to make or to enter into a contract; it also means, a Right resulting from contract. The two rights differ as cause and effect—as a power, from its exercise: the one Right is potential and general—always a part of the area of civil liberty—the second, a positive result, a specific acquisition.

Convention, covenant, contract, compact—this is the voluntary tie, the artificial *vinculum*, created by private will—not by the will of the community, the Law. When men come together, are drawn together, in good faith, in order to carry out their respective wills by combination and co-operation, not infringing Law; they are said to contract (*con* together, *tractus* drawn), to covenant (*con*, *venio* to come), or, using the same words substantively, to make a contract, to make a covenant or convention. Their co-operation (*con*, *opera* exertion) is manifested and carried out, either; 1. by something done at the moment, *e. g.* an exchange of a horse for a book; or, 2. an asserted resolve, on one or both sides, to do something at a future time, as, to give the horse or the book ten days hence—or, when some specified event shall have come about. Such asserted resolve is a promise, an undertaking. In the words of Domat:

'The use of conventions is a natural consequence of the order of civil society and of the ties which God forms among men. For as He has made the reciprocal use of their industry and labour and the different commerce of things neces-

sary for supplying all their wants, it is mainly by means of conventions that they make arrangements thereto. Thus, for the use of industry and labour, men enter into partnership, hire themselves out, and in various ways act the one for the other. Thus, for the use of things, when they have occasion to purchase them, or a mind to part with them, they traffic by sales and by exchanges, and when they only want them for a time, they either hire or borrow them; and according to their other different wants, they apply to them the different sorts of conventions.——— The subject matter of conventions is, the infinite diversity of the voluntary ways by which men regulate among themselves the communication and commerce of their industry and labour and of all things according to their wants. The commerce and communications for the use of persons and things are of four sorts; which make four species of conventions. For those who treat together, either give each other, reciprocally, one thing for another, as in a sale, and in an exchange; or they do one thing for another, as when they mutually undertake some business for each other; or otherwise one does something, and the other gives something, as when a labourer gives his labour for a certain hire; or lastly, one of them either does or gives something, the other neither doing nor giving any thing, as when a person undertakes gratuitously the business of another, or that one makes a gift out of sheer liberality.'

The four are, shortly; 1. gift for gift *(do ut des)*; 2. deed for deed *(facio ut facias)*; 3. deed for gift *(facio ut des)*; gift for deed *(do ut facias)*; 4. gratuitous: the three first are bilateral, reciprocal; the fourth, unilateral, in jural effect and significance.[nn]

Under the first head range, barter, exchange, sale: under the fourth, gift, as a pure benefaction. 'Exchange,' simply, and as usually understood, *viz.* as a present and complete occurrence, is undoubtedly a convention, a result of agreement, an act of commerce; but, so understood, it has no future, no element of suspense, no incidents calling for interposition of a law of contract. The same comment applies to gift, as a mere one-sided, actual transfer. Each is, *primâ facie*, a name for a past event—one not creative of personal obligations, nor in any wise subject to fluctuation of will; not therefore needing support of civil sanctions or remedies, as a contract. But, such views, however obvious, are not universal, nor free from exception. The translator of *Futawa Alumgeery* thus defines 'sale' in the code of the musulmans. 'Sale is the exchange of property for property, with mutual consent; and it is constituted by proposal and acceptance, or by reciprocal delivery.' In that Law, traffic of one definite substance *(ayn)* for another definite substance, is one of four modes or descriptions of the sale-contract; another mode being, where one of the articles of traffic is in any way indeterminate (although known and described), or is fungible, and is therefore a claim and right

merely (*deyn*), *e. g.* current coin. When the articles on both sides are homogeneous as well as fungible, as grain for grain, coin for coin, there, (because of the prohibition of *reba*, usury) strict equality of weight or measurement is required; and, in *surf* sales (*i. e. deyn* for *deyn*), immediate actual transfer of the rights trafficked in is indispensable. So that, with them, exchange and sale are in the same category, as a contract. In the Roman system, although 'exchange' strictly was no contract, yet, whenever one party in a convention had actually given over a subject of property (*res*) to another because and on the faith of that other's undertaking to transfer something else to him, by way of barter or exchange, then, the occurrence was a 'real contract,' under which the return was compelled: but this had no relation with the contract of 'purchase and sale.' The laws of *Islam* scarcely recognise pure benefaction, as either a mode or a cause of jural transfer. In them, 'gift' is regarded as a venture for an expected 'return,' which establishes reciprocity. A saying of the Prophet is recorded,—'A donor preserves a right to his gift, so long as he does not obtain a return for it' (see *Hedaya*)—hence, disability to retract is exceptional. The same jural ideas are carried out in the relations of the wife's right, *mihr* or dower, with the marital power and privileges. In another sense, it may well seem inconsistent and illogical to describe 'gift' as a unilateral transaction. The part of the receiver is not onerous or

responsible; yet is his part not unimportant, since he must give accord; and, as must be assumed, he, by so doing, gratifies the giver of the gift, *viz.* by acceding to the latter's wishes and act. Benefaction however, real or ostensible, is the normal character of those human dealings and interchanges with which civil Law has to do. The donor or giver's self-satisfaction is no appreciable civil gain; the civil benefaction of a 'gift' is therefore one-sided. But, Justinian, sympathising with the feelings of indiscreetly liberal and ill-used donors, conferred on his subjects a general authority (*'generaliter sancimus'*), whatever the status of the parties or the circumstances of the gift, to recal liberality wasted upon the grossly ungrateful and undeserving: the license to revoke, not to descend to the donor's heir. The grounds of revocation mentioned in the 'constitution', are; *injuria atrox*, described to be, violence to the donor's person, or fraud in prejudice of his fortune, also non-fulfilment of any concurrent provision on the donor's part, whether with or without writing.

The invention of a representative medium, a type of value, *viz.* current coin, money—necessarily facilitated transfer of and traffic in every description of property, right, and advantage: that invention in some respect changed or added to the science of jural conventions. I translate from *The Digest* the words of the jurist Paulus:

'Buying and selling took its rise from exchanges. Since, in former times, there was not

money, as now; nor was one commodity called *merx* (merchandise, goods), the other *pretium* (a price): but every one, according to the exigencies of the day and of circumstances, interchanged useless things for useful; seeing, it frequently happened that what was a superfluity with one was a want with another. But inasmuch as it did not always nor as a matter of-course come about, that, one man possessing what another coveted, the former should be willing to accept, in lieu, what the latter happened to have, therefore a substance was fixed upon, the acknowledged and permanent estimation of which should meet, by its uniformity of value, the difficulty of exchanges. That substance, being impressed with some public device, passes current as a medium of property, not so much in respect of intrinsic value, as a measure of quantity; henceforth, commodities interchanged were not both designated *merx*, but one was *pretium*.'

A notable change brought about by the invention of money, was, the relation of debtor and creditor, in the modern sense and as ordinarily understood, as distinct from the relation created by a deposit or bailment of what, in the language of Paulus, is properly called, *merx*.[oo] Loan of money is intrinsically different from the loan of what money may represent: the latter, if an infungible commodity, must be returned to the lender *in specie*; if fungible, must be precisely of the same nature,

intrinsically. Money is always not merely fungible, but may intrinsically vary, as silver for gold, and has no other use or value than to be passed away, in exchange for *merx*, or what is saleable. The Roman *mutuum* embraced not merely money, but whatever was estimated in kind, by weight, number or measure. The characteristic of the *mutuum* is thus noted by Paulus;—'It is called giving a *mutuum* because from mine it becomes thine (*de meo, tuum*): insomuch that if it does not become thine, the obligation [of *mutuum*] does not arise.'

A simple and scientific, though not minute analysis of the advantages and obligations, generally, created or producible by contract, was in use with the Roman jurists, each word having a technical force, *viz. dare*, when the promise or contract is, to transfer property, in full Right; *præstare*, where it is, to afford and furnish some advantage, as use, hire, or other benefit whatsoever, not being a proprietary transfer; *facere*, where it is a personal service, or some act or conduct not included in the two preceding—some exertion or some forbearance.

There is a not unusual mode of contracting which includes imposition of a conventional penalty for violation or neglect of some contract-obligation; as, where a sale contract contains a clause to the effect—'If I fail to make delivery as herein agreed, then I shall forfeit and pay to you £100.' It is in form, an alternative, but, in substance, a remedy, with a defined result, as a contract-sanction agreed on

for the occasion. This method may of-course be applied to support any manner of undertaking or stipulation.

The essentials and determinate incidents of every contract or jural convention are, 1. the parties to it, 2. the subject-matter, object of it, 3. its mode or form.

All persons having separate juridical existence, *i. e.* whose *status* does not involve a disability to speak and act for themselves, may contract: hence, children are partially, madmen entirely incapable.

The field for the matter and object of contracts, is, as already explained, the entire range of action permitted by the Law of the Land; interchange, modification, transfer, partition of rights, of property—whatever men may lawfully do or enjoy.

Such is the origin, the natural history, and general character of the class of jural obligations named 'contracts,' *i. e.* 'rights—therefore obligations—of contract'. Every scheme of civil laws recognises the inherent power and disposition of mankind, as well as their social need and advantage, to have dealings together, by interchange of rights, of properties,—by undertakings, by commerce of expectations. But, each scheme has its own requirements. For certain arrangements or bargains to have the character of contracts, one scheme requires that the matter agreed on be recorded in writing and be attested by the proper seals or signatures (or both,) of the persons contracting—the same or another scheme requires, that particular dealings, to be recognised as contracts,

must find expression in a particular form of language, that no other words, however intelligible, will suffice—another demands that a specific public officer testify to the making and the terms of a contract —or, that a registry of the fact, with specific formalities, be made by a specified authority. Now, it is plain, that those several requirements are artificial and arbitrary—that they form no part of the natural incidents of human dealings; nor is any one of them intrinsically essential—either to constitute or to shew a moral union of wills. It follows, that the moral fact, however obvious or unquestionable, of a particular conventional arrangement having been come to, upon any subject or of any kind, between members of any community, does not suffice as a manifestation of a contract; treating this word, 'contract' as the name of a class or head of sanctioned (*i. e.* civil) obligations.

Hence one ground of significance in the third determinate incident above noted, *viz.* the 'mode or form.' Whatever the motive or ground of the jural, even the formal requirement,—whether certainty and preservation of proof, or prevention of deceit (and this either against contractors or with reference to some law, some State-prohibition), or what else—that special legal requirement it is, which, in each case, is the chief and essential material or substance of the 'contract'—the jural edifice—the structure—the web of obligations, which the parties are bent on giving birth to.(pp)

It has been wisely and beneficently said by an

English judge, from the Bench,—"Courts of Law "are never better employed than in supporting the "rules of morality:"[qq] yet, with strict, though with somewhat technical truth, lord chancellor Eldon declared—"deciding upon civil rights, I "have nothing to do with the morality." Where the Law does not annex an obligation to a particular engagement or undertaking, no moral considerations can entitle the judge to pronounce that engagement obligatory: for him to do so would be, plainly to contradict and to contravert the *jural* rules of which alone a civil judge is exponent and vindicator. The principle of this distinction is well exemplified in the instance of a suit being founded upon a document or an arrangement which, according to the Law of the country in which the tribunal sits, may produce valid contractual obligations, but which nevertheless cannot be enforced by that tribunal, because the Law of another country—*e. g.* where the alleged contract (whether proved by writing or otherwise) was made—does not annex any civil obligations to the same: the rules of private international Law and the *comitas gentium*—hereafter to be explained—frequently obliging the tribunals of a State to carry out, not the rules and obligations laid down for the observance of those who are subject to the laws of that State, but the rules and requirements of some other State's laws, under which the contract had its inception or was to be performed. "If a contract

"is to be performed partly in one country and "partly in another, each portion is to be interpreted "according to the laws of the country where it "is to be performed."(rr)

As to mere ceremonial requirements, in contract; from history we learn their meaning and their justification.

In the infancy (moral and civil) of a nation, all organisation is in the rough—in out-line; the cords of duty and of right, provided by the nation to hold society together, are strong but few, and of a coarse texture; ethical refinements and niceties are unknown, or, if known and believed in, are regarded as needing super-human effort to observe; and, accordingly, they who do observe them are admired as exceptional beings. Voluntary efforts at right-doing which involve self-sacrifice or self-denial,—*i. e.* without palpable appeal to self-love or to fears, without appalling incident or superstitious sanction—are, in those days, not looked for.

Thus, Herodotus narrates:—"the Lydians and "Medes, on occasion of solemn compacts, were used "each one to draw blood from his own arm, and "each licked the other's blood" (bk. I, s. 74): "the "Arabs used to make their covenants in this wise— "a man stood between the contractants, made "an incision in the palm of each with a sharp "stone, and, taking a woof of each one's garment, "smeared with the blood seven stones placed in "the centre, invoking Bacchus and Urania" (bk. III, s. 8): "the Scythians poured wine into

"a large earthen cup, mixing with it the blood "of those who were entering into the compact; hav- "ing pricked with a needle or slightly wounded with "a sword some part of the body of each, they dipped "in the cup a scymitar, some arrows, an axe and "a javelin, then, after much invocation, the con- "tracting parties and the most considerable of those "present drank it up" (bk. IV, s. 69): "the Nasa- "mones [an African tribe] made use of this form of "faith-pledging; each one gave to the other to drink "out of his hand; but, should there be no liquid "to be had, they took up the dust of the ground "and licked it" (bk. VI, s. 172).[88] Colonel Tod describing Rajpoot records, political and domestic, of remote antiquity, relates,—"Every subject com- "mences with invoking the sun and moon as wit- "nesses, and concludes with a denunciation of the "severest penalties on those who break the spirit of "the imperishable bond." The Swedish historian says of the Scandinavians,—"The great yearly "sacrifices assembled and united the people.—Under "the shield of peace, the sacrifice, with the attendant "banquet, was prepared; deliberations were held, "sentence passed, and traffic conducted: for which "reason *ting*, the old name of these conventions, "means both sacrifice, banquet, diet, assize, "and fair." In Sprenger's 'Life of Mohammad' is an ancient musulman legend, of the first man, Adam, breaking faith with the angel of death; it concludes with this reflection or moral:— "The father of mankind is the father of deception.

"God, therefore, ordered Man, through Seth, to make "engagements in writing, and to call witnesses, in "order that they may not be broken—" The scope and moral of the legend is, to typify and record the prevalence of bad faith, in all ages, and the need of legal precautions.(tt) With the growth of commerce, the necessity, the general need (and value therefore) of good-faith, inevitably becomes more apparent; as well as the inconvenience of cumbrous forms or of superstitious ceremonial, in the conduct of trade and traffic, *i. e.* in contracting. Gradually, as the intrinsic worth of the jural tie of contract—and of its essential basis, conventional good-faith—forces itself (from any cause) upon a people's notice and conscience, the extrinsic ceremonial, the unwieldy harness of form, vanishes, by little and little—drops off, leaving only such dress and form as may suffice to attest the abstract mental as well as verbal undertaking. The obligation of contract becomes then merely, to use a Roman term, consensual, *i. e.* valued and enforced because of the *consensus* (mutual understanding), without more.(uu)

(*a*) WHEWELL. This is a clearer enunciation of Aristotle's sentiment:—"all men have some natural inclination to justice, but they "proceed thereon only to a certain degree; nor can they universally "point out what is absolutely just." *Politics.*

(*b*) BACON

(*c*) All must acquiesce in the reasoning of Bentham, that the chief value of that security which the Law confers, *i. e.* of every Right, is, the justification which it affords to expectation; and expectation may be explained and amplified, as a confident assurance, that, in the veiled future, either present and actual enjoyment will be continued, or, coveted

enjoyment will be attained. Indeed, the Law creates the expectation.—"The savage who has killed a deer may hope to keep it for himself, so "long as his cave is undiscovered; so long as he watches to defend it, "and is stronger than his rivals; but that is all. How miserable and "precarious is such a possession! If we suppose the least agreement "among savages to respect the acquisitions of each other, we see the "introduction of a principle to which no name can be given but that of "Law. A feeble and momentary expectation may result from time to "time from circumstances purely physical; but a strong and permanent "expectation can result only from Law. That which, in the natural "state, was an almost invisible thread, in the social state becomes a "cable." *Theory of Legislation.*

Bentham's reasoning, proving, as it does, that the goal of civil society, in a very early stage of human progress, is inevitable, scarcely serves for a premiss (as intended and used by him,) to induce the conclusion, that Man's laws alone produce either Rights or obligations. Whether called the moral sense, or a sense of utility, or a mutual dread and sense of need of mutual protection, or what else—a common impulse and necessity has universally (in time and place) formed society, and civil sanctions, and laws.

(d) To what extent or when the subject is *at liberty* to disregard mandates of civil Law, is a question of casuistry. Dread of such disregard—of the influence of civil sanction succumbing to other moral motives—is a powerful ground for and cause of legislation. It has been wisely said:—"the constitution of every country has in it something "which is suited to the national character and the result of the national "history; and is therefore the best basis for political improvements. "The constitution of the country has claims upon our fidelity, reverence "and affection. It is a fit object of such sentiments, as being the na-"tional constitution; but its claims may be neutralised by its defects "as a constitution, and by the impossibility of producing a reform by "constitutional means." WHEWELL

(e) It may seem, that this cannot be predicated of *merely* penal laws or positive civil prohibitions, *e. g.* customs laws, sumptuary laws, restrictions of the Press; but, as every prohibition is built upon the idea that it is needful for the welfare of the community, it is the Right of every member that the prohibition be enforced—and this, irrespective of the mode of reaching the sanction, whether through a civil or a criminal proceeding.

(f) To use the words of an English judge (Maule)—'When a statute gives a Right, then, although in express terms it has not given a remedy,

the remedy which, by Law, is properly applicable to that Right, follows as an incident.'

Hence, practical Law, the essential knowledge of a law-practitioner, has come to be thought and treated as little more than an explanatory catalogue of remedies. One so qualified, is a law-druggist, in contrast with the jurist or physician.

(g) like to Right of contract before any contract made.

(h) Austin supports the view of the pursuit given by Law being itself a Right, although but a sequel of other Rights, *i. e.* conditioned upon infringement of some original, prior Right: *viz.* "It is impossible "to extricate the right of action itself from those subsidiary rights by "which it is enforced. And it is manifestly absurd to deny, that the "process involves right because the rights which it involves are instru- "ments for the attainment of another right." Austin, therefore, explains and analyses "rights and obligations which do *not* arise out of violations "and those which *do*." This Right (of remedy) it is which gives value and reality to every Right, secures each correlative obligation, comes into existence in substitution of something lost—which cannot be said to be included, valuable and material as it is, in any description of original Rights, personal or external. It is an alternative enjoyment (when any Right or fruition of Right is lost or invaded), just as sanction is the alternative to obedience of the Law's mandate. The alternative is a distinct command, an infliction; so, remedy (legal redress, right of action, being an inquisitorial attack upon the party amenable,) is distinctly given, as an alternative or adjective Right. The very first of the Decemvirate laws declares or confirms this Right, in the rule of compulsory attendance before the dispenser of the Law, the summoning *(vocatio in jus)*; and the obligation from delict, *i. e.* created by wrong *(ex ipso maleficio)*, found in the Roman system, is but a correlative to the Right of remedy.

(i) "—We ought not to render any one more imperfect or unhappy "*i. e.* injure any one. And because to what constitutes our felicity "and perfection, belongs not only our *body*, but more especially our "*mind*, this precept must extend to both these parts, and an injury to "our mind must be as much greater than an injury to our bodily part, as "the mind is more excellent than the body." HEINECCIVS.

(j) A French jurist, M. Fritôt, thus classes and enumerates violations of personal security and freedom :—

"1. to deprive of the use of any member of the body, or of any "physical or mental faculty—even publication of thought; saving legal "restraint from abuse of any faculty.

"2. to subject to cruel treatment.

"3. to force a distasteful marriage.

"4. to deprive either spouse of the other.

"5. to separate parents and children.

"6. to impose forceably any civil calling, or to deprive of one; even "to force into a military career, unless in organised submission to a "public necessity.

"7. to meddle with and to appropriate the efforts of industry.

"8. to interfere with voluntary disposal of time and industrial effort.

"9. to restrict free change of habitation; to fix to the soil.

"9. to invade the privacy of home: to force into exile or abandon- "ment of home.

"10. to imprison, or detain arbitrarily."

The list is neither exhaustive, nor quite consistent; but it gives a comprehensive view of trespasses upon personal inviolability and freedom. All rights, inherent and adherent, which are irrespective of relation between persons and things—which are included within the sphere of self, and action of self, however civilly extended—may be considered as modes of personal freedom; but a large class are more conveniently classed under *status*. I have intended to confine the present head, to invasions of person which ignore or interfere with primary, positive, necessary rights inherent in the person.

(k) Sec. 298. "Whoever, with the deliberate intention of wounding "the religious feelings of any person, utters any word or makes any "sound in the hearing of that person, or makes any gesture in the sight "of that person, or places any object in the sight of that person, shall "be punished &c." This enactment evinces an anxious sense (justified by experience) of risks,—of need for unusual State interference and protection; the risks and the need being produced by an exceptional and forced civil or political mingling of races. Students of History will recognise the truth and force of Chancellor Kent's opinion; who having boasted that—"The free exercise and en- "joyment of religious profession and worship may be considered "as one of the absolute rights of individuals, recognized in our "American constitutions, and secured to them by Law"—proceeds— "Civil and religious liberty generally go hand in hand, and the sup- "pression of either of them, for any length of time, will terminate "the existence of the other."

Here the term 'civil' refers to all other description of free thought and action than what exclusively appertains to the indulgence and cultivation of Man's religious sense. But, the most entire liberty (—range

of action) in adoption of religious opinion, permits of State-measures for supplying the religious needs of a people. Religious action, in some direction, of civilized men, is inevitable. To make that action consistent with and subservient to the general welfare—to prevent its being subversive of the polity itself—is clearly within the province of the secular arm, and no infringement of liberty: whilst, direction of religious opinion and dogmas is out of the sphere of civil laws.

(l) It has been maintained (and surely not without reason), that, under no theory or scheme of civil government, is it rationally or morally permitted to the subject, to yield up or to abdicate natural faculties, bodily or mental; and therefore, Man violates the paramount, the obvious, Reason-promulgated code of Nature, when he surrenders or even alienates, generally, his personal liberty of thought and of utterance of thought: in as much as, in those consists the very essence of Man's rationality and distinctive character. It may be, and without hyperbole, affirmed:—Man in vain assents to be less than Man!

(m) These sentences are from the *Encyclopædia Metropolitana* ('Law'); whence I extract a summary exposition of the Right treated of, *viz.*—

'The right of self-defence is more comprehensive in a state of nature than in civil society. In the former, every individual is the protector of his own rights, with respect to the future as well as to the present. But in civil society, private individuals are permitted, and that from unavoidable necessity, to use violence only in the immediate defence of their persons or property; all steps for their future security being reserved for the public authorities. With respect to *present* self-defence, which we have now to consider by itself, its just limits we conceive, whatever some writers may assert to the contrary, are precisely the same in civil society and in a natural state. This right, as Grotius observes, arises directly and immediately from the care of our own preservation, which nature recommends to every one, and not from the injustice or crime of the aggressor who may threaten our safety. So that if a person, involuntarily, or by mistake or accident assaults me or in any way places my life in imminent danger, I am not to be debarred, by the consideration of his innocence, from consulting my own safety, even at the expense of his life. The law of charity does not require me to have a *greater* regard for him than for myself. But on the other hand, the same law requires that I should not have a less. If, therefore, my own defence will probably do him a greater injury than he will do me, I should

submit to be the sufferer. This is the broad and intelligible rule. Jurists sometimes introduce other collateral or subordinate considerations, which we cannot here examine, to modify the right of self-defence under particular circumstances. Cases of this kind, where, without any blame attaching to either party, the sacrifice of one or other of them becomes unavoidable, are of rare occurrence, and fall more properly within the province of casuistry than of jurisprudence. The right of self-defence, as jurists commonly treat it, relates principally to the repelling of wilful and malicious assaults. Pufendorf, and others after him, contend, but assuredly with very inadequate notions of the obligations of humanity, that the unjust intention of the assailant, however slight an injury he may attempt, deprives him of *all* title to consideration; and that therefore although it may sometimes be more *prudent* for the party assailed to submit to a trivial wrong, than to avert it by the death, even, of the assailant, there can be no *obligation* upon him to that effect. Where then should the line be drawn? The limit of rightful self-defence is, we conceive, identified with the limit of just punishment; that is to say, whatever would be the utmost amount of punishment that could properly be inflicted for the crime apparently intended, supposing it to have been completed, to that length of harm, the right of self-defence may be justly carried: beyond it, the obligation of endurance begins. Such appears to be the principle recognized in the laws of most well-regulated communities, which rarely suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death. And thus the defence of life, limb or chastity, has in all or most countries, been held a sufficient justification for the taking of life. But it must be understood that the party assailed is in no case privileged to proceed even to the length we have stated, unless it be absolutely necessary for his own immediate safety. It may be objected that the limit drawn is merely theoretical, because in the hurry, danger, and excitement of the moment and moreover where self is in question, it is rarely possible to weigh the matter very nicely. However we have only attempted to describe generally what is strictly and rigidly *justifiable*. Some excess must always be *excused*, provided it does not surpass the fair allowance claimable on the score of ordinary human infirmity, and become an act of cruelty; in which case the gross excess would be a just ground of punishment. It only remains to be observed that, as a general rule, whatever violence an individual may lawfully exert in his own defence, he may

equally exert in defence of another person who stands in a near domestic relation to him.'

(n) Such maturity of body and mind, as presumptively indicates ability to perform the duties and to fill the relations of civil life, is a problem that receives generally an artificial solution, by fixing a precise age when the citizen can act with legal effect and complete responsibility. Mere years however do not always decide: the English criminal code acts on the maxim 'malice is a substitute for mature age' *(malitia supplet ætatem)* after the 8th year: the *Sheraa* terminates legal nonage as soon as signs of puberty appear, after the age of 12 in a male, and of 9 in a female. 'The old Roman religious system assumed the natural life of man to be 120 years, reduced into 90 by Fate, and divided into three equal periods of 30 years, whereof the first subdivision of 15 years represented boyhood. The practical view taken by Servius Tullius added two years to this for military service; hence, probably, the variations we find in the period of puberty, which varied between 14 and 18, that is to say, in the 14th or 18th year. A man might be potent in the 14th year, but not strong enough to bear arms.'

(From Colquhuon's Summary.)

(*o*) which (nor less where universal suffrage prevails) must be an indication of political power and, usually, of fitness for State office or dignity. Besides, whether regarded as a result or as a means, it represents vast resources, material and moral; its possessor is set on high, and he cannot but influence the fate of the community, individually and collectively.

(*p*) He may be an idler, a vagabond, a helpless and cureless dependent upon casual or upon public charity: he may devote his energies to scientific discovery, as Humphrey Davy, Csoma Koros, and a host of pioneers of human progress; or to moral teaching by life-like, deep-searching fiction, as Smollett, Goldsmith, Thackeray, Dickens; or to purely philanthropic labours, the friend of the friendless, as Howard, Elizabeth Fry, Florence Nightingale; to a benevolent ambition and self-denying intellectual labour, as a public reformer and teacher, as Bentham, Austin, as (with more limited means of moral power) the Calcutta journalist, Hurrischunder Mookerjea,—or, a self-denying teacher of religion, such as were Felix Neff, Henry Martin, and many like to them, or as the apostle of education for the Native Indian, David Hare: he may be a Garibaldi, a Kossuth, a Robert Burns, a Samuel Johnson: he may be a devotee at the shrine of a debasing self-indulgence, using his Reason to misapply and degrade gifts of Nature and of Fortune, the only use of such an one being,

as conductor and scatterer of material wealth and an example to warn. The many modes indicated of spending and passing life, obviously, can seldom (nor can any mode) be destitute of jural significance, with reference to the place, the value, the functions and influence of a man among his fellow citizens.

(*q*) Women, from natural, social, and civil causes, must have a distinct civil position or status. The kind and degree of subordination, the extent of civil and political capacity, regulating or composing the female status, are accidents of policy, of national sentiment, of history.

(*r*) *Existimatio* with the Romans was the aggregate of qualities and conditions, whether legal, conventional and social, or moral, that went to make up and render perfect, the honour and respectability as well as the (strictly civil) *status* of a citizen.

(*s*) Something else than self-regard or self-love—a sentiment which I before treated, under the name of *amour-propre*, as a Right; but self-love, so far as justifiable, is merely self-preservation.

Even a casual observer of life and conduct, must be soon convinced, how valued and how indispensable is that considerate regard (or semblance of regard) for the feelings—that tender forbearance towards the frailties—of each other, which obtain among the civilized (whether polished or rude) of mankind, and which, under varied circumstances or modifications, are termed and represented as, politeness, civility, courtesy, amiability, philanthropy,—some, or all combined, of those qualities of kindness, of pleasantness, in temperament—at least in demeanour. As a current coin, such consideration and forbearance are appreciated, and therefore accorded by the most self-regarding; for the hypocritical or reluctant bestower is ever a willing recipient of what he would, if he could, reserve and monopolise.

I extract from a popular author a forcible description of the uses of a feeling or quality, which, although indicative of human frailty, seems to include much that one may class with self-respect:—it is the hope, the seeking for, the expectation, of deference, of sympathy, of approbation, of praise.

"Vanity is to a man what the oily secretion is to a bird, with which "it sleeks and adjusts the plumage ruffled, by whatever causes. Vani- "ty is not only instrumental in keeping a man alive and in heart, but, in "its lighter manifestations it is the great sweetener of social existence. "—It delights to bask in the sunshine of approbation.—An imaginative "man recognises at once a portion of himself in his fellow, and speaks "to that. To hurt you is to hurt himself. Much of the rudeness we "encounter in life cannot be properly set down to cruelty or badness

"of heart. The unimaginative man is callous, and although he hurts "easily, he cannot be easily hurt in return."

(Alexander Smith's *Dreamthorp*.)

Montesquieu enlarges upon the uses of national vanity, as contrasted with national pride. Bk. XIX, ch. 9.

(t) To upbraid one who had an insult, personal or hereditary, to avenge, was an offence punishable by the laws of Genoa.

(u) The etymology of this word may be safely taken from classical Roman literature, where we find it thus variously used:—
'sleep occupies his limbs;' 'paleness occupies his face;' 'the fame of it occupies our ears;' 'sturdily occupy the gate;' 'Ennius was the first who occupied [*i. e.* employed] that phrase.'

(v) Dr. Maine defines 'occupancy' to be, "the advised assumption "of physical possession," and considers the term to be misapplied in denoting the origin of property; to the early history of which he despairs of obtaining a complete clue. Possession by groups of mankind *i. e.* families or their extension, as instanced in the Indian village communities, is noted by Dr. Maine as the earliest trace of an exclusive ownership. The organised civilization of our race in groups, has been the rule: and Dr. Maine ably exposes the error of individualising men in the progress to jural institutions: still, occupancy of particular spots of Earth, by the family or tribe or horde must have occurred, and that deliberately. Discovery of historical truth, as to the mode in which our race have settled or grouped, scarcely tends to displace the juridical postulate, that distinct primary occupation (as the word is explained in the text) of all unappropriated subjects of possible property, must be the beginning of every external real Right. Nor is any dilemma suggested in the supposition that, among rude men and tribes, a weaker occupant will be molested and ousted by a stronger. The observance of the rule may have grown up slowly and amidst obstacles; and artificial sanctions may have only gradually been introduced, to protect the occupant tribe or family or individual. Such probable difficulties of circumstance do not refute the position, that all material property must have had a first occupant (whether a person or a group), who exercised an *arbitrium* (will, desire), either adversely or permissively. "Primitive acquisition" said Kant, "is "one not derived from any other's ownership."

A recent publication of high literary merit (valuable also for more solid qualities) uses phrases like the following.—"Mr. Jonas has "proved by experience, that, in cultivating his great occupation, &c." —"in England, it is deemed requisite that a tenant farmer, on renting an

"occupation, should have &c." Now, Englishmen say, 'he has 100 acres in his occupation' but not, 'he has an occupation of 100 acres.' Elihu Burritt, the American author of that work, was doubtless familiar with this use of the word—one, suggestive of power, of Right, perhaps of personal superintendance, rather than of any corporeal relation.

The terms occupy, occupier, occupation, have acquired technical meanings in municipal laws, *e. g.* in the law of English parliamentary elections, and in the Indian ryot's charter, Act X. of 1859. Under all circumstances, an occupier is, a holder—at one time perhaps, of an interest, at another of a substance, distinctively.

(w) Certainly something more than the labour of mere occupancy *i. e.* taking and holding. But, we can scarcely speculate either upon the degree or upon the kinds and mode of use—of turning to account, which archaic chiefs construed into proprietary taking, *i. e.* occupancy. The rule of decision probably differed, with place and circumstance: under a tropical sun or in hunting grounds, need of ground for rest and shade (both or either), without more, might have afforded even a righteous plea for exclusive occupancy, within a rational limit. Nor are early polities at all uniform in their modes of appropriation—in utilising their aggregate of *res*. Among that ancient, numerous and hardy people, the Suevi, as we learn from an eye-witness, Cæsar, in his Gallic campaigns, individual property in land was unknown, because disregarded. A depôt only tarried at home, and provided for the wants of all, by culture of the fields; whilst the bulk of the nation sallied forth to the more congenial pursuit of arms. And, of the Germans, the same author says; "—nor "has any one of them any defined or appropriated land; but the "magistrates and chiefs assign yearly to the several tribes and "families, who meet together for that purpose, as much land, and "in such locality, as they think fit, and compel them, after a year, "to change their holdings." To the same effect wrote Tacitus, in his treatise of the manners of the Germans. How different the race, of whom an officially accredited traveller and historian, Colonel Tod, records:—"The love of Country and the passion for possessing "land are strong throughout Rajpootana: while there is a hope of "existence, the cultivator clings to the *bapota* [patrimony], and "in Harouti this *amor patriæ* is so invincible, that, to use their "homely phrase, 'he would rather fill his *pait* [belly] in slavery "there, than live in luxury abroad!—" The same writer relates, with reference to the land-occupant or ryot, in one district,—"If

"in exile, from whatever cause, he can assign his share to trustees; "and the more strongly to mark his inalienable right in such a "case, the trustees reserve on his account two seers on every "maund of produce, which is emphatically termed, *huk bapatâ cá "bhom, i. e.* the dues of the patrimonial soil." A resident and traveller among the tribes of Southern Africa (the Rev. E. Casalis) says of the Basutos and other primitive agricultural non-nomadic peoples:—"The sale or transfer of land is unknown among these "people. The country is understood to belong to the whole community, "and no one has a right to dispose of the soil from which he "derives his support. The sovereign chiefs assign to their vassals "the parts they are to occupy; and these latter grant to every father "of a family a portion of arable land proportionate to his wants. "The land thus granted is insured to the cultivator as long as he "does not change his locality. If he goes to settle elsewhere, "he must restore the fields to the chief under whom he holds them, "in order that the latter may dispose of them to some other "person." The traveller Burton thus speaks of his experiences at Abeokuta in Western Africa:—

"Whatever be the tenure of property in ground, it cannot perma- "nently be given or sold. A chief will, for a quit-rent, permit any "stranger to cultivate unreclaimed commons, but the bargain is purely "personal. If the original tenant die, the heir or successor is expected "by another 'dash' [something to be given] to obtain renewal of the "lease, and his refusal would justify in the African mind, his ejection. "On the other hand, if the chief attempt to raise his terms, the heir might "insist upon not paying a sum higher than the original quit-rent, and "amongst the more civilized tribes the voice of the people would be "on his side."

With the early Romans, property (*mancipium, dominium ex jure Quiritium*) had a technical and political character: subjects of property were arbitrarily classed: modes of transfer were cumbrous and curiously artificial. Variable and numerous as the peals, the harmonies and discords, which may be rung upon ranges or octaves of bells (illustrative of the laws and modulation of sound), are the modes, the changes, the application, under which varying circumstances exhibit—no less in the primitive civilizations still being discovered or becoming familiar to us, than in the past history of mankind—the simple principles, the bases of general jurisprudence. Whether this or that community, whether the earliest organised political bodies, whether the majority, have or not appropriated their portions

of the estate of mankind, or any subjects of property whatever, collectively, in groups, or individually, whether in simple and absolute dominion, or temporarily, for unlimited use or as partial usufructuaries,—whether with as little ceremony and method as do the feathered architects who, with unconscious and unerring skill, select sites for nest-building, the bees for their hive, the beavers for their elaborate and city-like structures; or, whether with Quirital formalities—are alternatives, questions and differences, not indicating any variation, or new principle of jurisprudence, but, all carrying out the simplest principles, each and all illustrating the same inevitable truths, the philosophy of the Law of property. The variations of circumstance and of rule, constituting the idiosyncrasy of each people's ways, wants and wishes, are phenomena, but not of the science of Law.

(x) A further extract from the same accurate and severe analyst of principles makes this more clear:—"At first, all men are in "common possession of the estate of the whole Earth, and desiring "(as all naturally must do) to gather the produce of that common estate. "This feeling of desire, however, by reason of the rivalry, natural "and inevitable, between individual wills, would go to preclude en- "joyment of that estate by any one; did it not also embody a law "of order for the will itself, according to which a separate posses- "sion in the common estate is capable of allotment to each indivi- "dual. But a distributive law of 'meum and tuum' for each, in "the common estate, after the axiom of an 'external liberty,' can "only result from a common desire, primitive and *a priori*—a desire "not implying any juridical act of association. It [such distributive law] "can not therefore exist save in a state of civil society; wherein "alone may be fashioned definitions of Right, of what is juridical, "of what is lawful." KANT

(y) As, suppose a single man happen to be in possession of an island, without interference or claim by any other,—can it be said that he is proprietor of the land, trees, fruits, animals and other *res* or productions which he enjoys? He can have no relation with any creature in his territory—no civil obligation, therefore no civil right. He is without society, therefore without rival or possible co-owner.

(z) It may be objected, that the illustration here contradicts the proposition; inasmuch as original property thus continues to be acquired.—The answer is; national acquisition as against other nations, comes under a different category, *viz.* international Law.

(aa) I include, as a matter of general jurisprudence, and ir-

respective of international rules, the shores of the ocean among *res* common to mankind—as only *quodammodo* (qualifiedly) appropriable. In practice, if the buildings or occupied lands of a town abut on the sea (as Madras, Brest, Naples, Brighton, Macao), it is too much to say, that the land, at least at high-water mark, is common to the world and beyond the State's laws—scarcely can it be said, that it is (to use a Roman phrase) extra-patrimonial. Sir Geo. Bowyer in his 'Commentaries on Universal Public Law' writes: "The shores of the sea incontestably belong to the nation that "possesses the country of which they are a part, and they belong "to the class of public things. If civilians have set them down as "things common to all mankind (*res communes*), it is only in regard "to their use; and we are not thence to conclude that they considered "them as independent of the empire. The very contrary appears "from a great number of laws. Ports and harbours are manifestly "an appendage to and even a part of the country, and consequently "are the property of the nation. Whatever is said of the land "itself will equally apply to them, so far as respects the consequences "of the domain and of the empire."

The subject is somewhat differently treated by Lord Stair in his Institutions: "—so all nations have free passage by navigation through "the ocean, in bays and navigable rivers; and have also the benefit of "stations, or roads and harbours in the sea or rivers; and have the "common use of the shores for casting anchors, disloading of goods, "taking in of ballast, or water rising in fountains there, drying of "nets, erecting of tents, and the like. Yet doth the shore remain "proper, not only as to jurisdiction, but as to houses, or works "built thereupon; and as to minerals, coals, or the like found therein, "and so is not in whole common, but some uses thereof only. Nor "doth it follow, that these uses are not common to all men, because "they are denied to enemies; for, as for these, as we may take "away that which is in their power, in some cases; so much more "may we detain from them that which is our own; and as we "pursue their persons and goods in their own bounds, much more "in ours. The shore in the civil-law is defined to be, so far as "the greatest winter tides do run, which must be understood of "ordinary tides, and not of extraordinary spring tides. But the use "of the banks of the sea or rivers, to cast anchors or lay goods "thereon, or to tie cables to trees growing thereon, or the use of "ports, which are industrial, or stations made by art, or fortified for "security, are not common to all men, but public to their own

"people, or allowed freely to others for commerce, or in some cases are "granted for a reasonable satisfaction of anchorage, portage, or "shore-dues, which oft-times belong to private persons, by their proper "right, or by custom, or by public grant; but stations in these rivers, "by casting of anchor, remain common, and ought not to be "burdened."

(bb) Wild animals although certainly valuable to mankind, and among the earliest of appropriated goods (by the chase), are not in the class of common things; nor are the most formidable of brute creatures beyond Man's dominant prerogative: they are, as land, or fruit, or aught else appropriable, property, when and whilst *occupied*. What is special with regard to this sort of *res* is, the extra labour and skill to take them—to effect their capture and detention.

(cc) The *res publicæ* of the Roman system included but a portion of what is intended to be here classed; the distinction with them having reference to local and national views. Whatever, for the public benefit, is withdrawn from commerce, from individual appropriation, is, in a general and purely juridical sense, public.

(dd) "Whenever an article usurped is altered in consequence of an "act of the usurper, in such a manner that it loses both its name and "its original purpose, it is then separated from the right of the pro- "prietor, and becomes responsible for it; but he is not entitled to "derive any advantage from it until he pay the compensation. An "example of this occurs where a person usurps a goat, kills it, and "afterwards roasts or boils it; or usurps wheat, and afterwards grinds "it into flour; or usurps iron, and makes a sword from it;—or "usurps clay, and makes a vessel from it. What is here advanced is "according to our doctors. Shafei maintains that, after the alteration "in the article, the right of the proprietor to it is not extinguished, "but he is entitled to take from the usurper the flour of his wheat. "There is also a report from Aboo Yoosaf to the same effect. He, "however, maintains that in case the proprietor choose to take the "flour of the wheat, he is not entitled to a compensation for the "damage, as that would induce usury; whereas Shafei holds that he "is entitled to a compensation from the usurper for the damage. It "is also related, as an opinion of Aboo Yoosaf, that the right of "property with respect to an usurped article which has been altered "ceases in the proprietor, but that it may be sold to answer the debt "due to him (*viz.* the compensation,) and that, in case of the death "of the usurper, he has a preferable claim to the other creditors with

"respect to the article in question. The reasoning of Shafei is, "that the substance of the thing being extant, notwithstanding it "have undergone an alteration, it follows that the right of property "still remains in the proprietor, since the quality is merely a dependant "on the substance;—as where, for instance, the wind blows wheat "into the mill of another person, and it is ground into flour; in which "case it continues the property of the original proprietor of the "wheat; and so also in the case in question. With respect to the "act of the usurper by which the thing is altered, it is not to be "regarded, since it is an unlawful act, and consequently incapable "of becoming the cause of property,—as has been explained in its "proper place. The case is therefore the same as if the act had "never existed;—in the same manner as holds where an usurper kills "an usurped goat, and tears the skin of it in pieces. The argument of "our doctor is, that in the case in question the usurper has performed "an operation which bears a value, and has therefore destroyed the "right of the proprietor in one respect, inasmuch as the appearance "is no longer the same, whence it is that the name is changed, and "many of the original purposes of the article defeated; as grains of "wheat, for instance, which are fit for being sown or roasted, but "after being converted into flour are no longer fit for these purposes. "In short, by the alteration of an article usurped the right of the "proprietor is destroyed in one shape, and that of the usurper with "respect to the qualities is established in every shape; and hence "the right of the usurper has a superiority with respect to the "original of that thing which has been in one shape destroyed." Again:

"If a person usurp gold or silver, and convert it into *dirms* "or *deenars*, or makes a vessel from it, such silver or gold does not "separate from the property of the proprietor, according to Haneefa, "—whence he is entitled to take it from the usurper without giving "him any compensation. The two disciples maintain that the us- "urper, in such case, acquires a property in the metal, and owes "a compensation of a similar quantity of gold or silver to the original "proprietor; because he has performed a valuable operation upon "the metal, which in one shape destroys the right of the proprietor, "since in so doing he has broken it down so as to destroy its "original purposes, inasmuch as bullion is unfit to become the "stock in a contract of *mozaribat*, or of partnership, whereas "coined money has this fitness. The reasoning of Haneefa is, that "in the case in question the substance of the thing usurped is ex-

"tant in every respect, insomuch that it still preserves its name: "and the purposes to which gold and silver relate, such as price and "weight, are also extant, insomuch that usury by weight takes place "in them when coined, in the same manner as before coinage." And, "If a person usurp the cloth of another and then dye it red, or "the flour of another and then mix it with oil, in that case the "proprietor has the option of taking from the usurper a compensa- "tion equal to the value of the white cloth, or an equal quantity "of flour, giving the red cloth or the mixed flour to the usurper,— "or, of taking the red cloth or the mixed flour, giving to the us- "urper a compensation equal to the additional value these articles "may have acquired from the red dye, or the mixture of oil. Shafei "maintains that in the case of dyed cloth the proprietor of it has "a right to take it, and then to tell the usurper to separate and "take, to the utmost of his power, his dye from it; for he holds "this case to be analogous to that of a plot of ground; (in other "words, if a person usurp a piece of ground belonging to another, "and afterwards erect a building upon it, the proprietor is entitled "to take the ground, desiring the usurper to dig up and carry away "his building;) because the separation of a dye from stained cloth "is equally practicable with the removal of a building from the "ground on which it stands. It is otherwise in the case of oil mixed "in flour, because the separation of the oil is then impracticable."

Hedaya.

(*ee*) From Dr. Colquhuon's Summary.

(ff) The English 'use' originally denoted beneficial enjoyment, having the benefit of, being analogous to the Prœtorian *in bonis* of the Roman Law: it grew into a merely technical and auxiliary mode of property.

(gg) The distinction is thus illustrated by Dr. Taylor—If I treat for a slave, a house, or a horse; or, if a slave, &c. be left me by will,—that specific slave or horse is due to me, *quia functionem in suo corpore recipiunt* [because each respectively does its own work in its own individuality]; and if I am creditor for one of these, my debtor cannot force upon me one of another sort, though a better in value. But such things as consist in number, weight, and measure, *non specificam functionem sed generalem recipiunt* [have not any individual function, but work in the general—interchangeably]: a legacy of £20 is as lawfully paid in one legal coin as another; and, if I borrow a measure of wheat, I am not expected to return the same grains, but am to pay it in the same quantity, of equal goodness.

(hh) The distinction is very marked in the English system, between dominical and subordinate property, *viz.* 'the fee,' 'freehold,' 'realty,'—and 'chattel-real,' 'personal property in land,' 'leasehold interest (though for a thousand years).' The terms, freehold, realty, are certainly applicable to property which does not devolve on the proprietor's heir, (in which, therefore, he has not complete *jus abutendi*): but a life-estate is incomparably more important than an estate for a term of years; even though the term be such as must, physically, include scores of lives. The Roman *emphyteusis*, in its most valuable form, after the reign of Zeno, is a remarkable instance of *quasi*-dominical property (see Colquhuon 'Summary of the R. C. L.' § 169, &c.): the anomalous interest of a Hindu widow heir is another instance, perhaps a closer approach to *dominium*—limited, but undefinable in words.

(ii) Butler in his celebrated Note (on Feuds) to *Co. Lit.*, remarks of the relation, at that period;—"Though in point of dignity, of rank, "and of honor, the lord, according to the ideas of those times, enjoyed "a splendid pre-eminence over his vassals, his power over them was, com- "paratively speaking, extremely small.——The fruits and incidents of "the feudal tenure, in the original simplicity of the feud, were reducible "to two: on the part of the lord, to the obligation of warranty, that is, "to defend the title of his tenant against all others; on the part of the "tenant, to an obligation of giving his lord his aid, that is, his military "assistance and service in defence of the feud." It is true, that the feudal estate lapsed to the lord upon failure of heirs, *i. e.* in such case, the lord came in place of the king or of the State: but this contingency is not any 'property' or jural interest in the land. "Government succeeds" wrote chancellor Kent, "as ofcourse, to the "personal and real estate of the intestate, when he has no heirs or "next of kin to appear and claim it; but this is for the sake of order "and good policy—"

(kk) Grotius quotes those two sentences; the first from Seneca, the other from Dion Prusæensis. Lordship over land was the sovereignty of the middle ages: subjection to power, when not simply military nor simply servile, was territorial: hence the nude superiority of feudalism. But seignory or *seigneurie* is used to designate a more tangible and usual mode of property; *e. g.* Hind, in his 'Labrador Exploration' narrates:

"As we sailed before a gentle breeze through the clustered Mingan islands in "1861, it suddenly occurred to me that exactly 200 years ago, namely, 1661, François "Bissot had been invested with the rights of *seigneur* of Mingan. For 200 years "these rights have endured; but the owners are now dispersed far and wide in "both continents. Sailing amidst these remote islands, looking so fair and beauti-

"ful as we drifted lazily along before the dying breeze, I could not but think it "both unjust and unpatriotic that abused and misapplied seignorial rights, conveying "many million acres to single individuals, 200 years ago, should now exercise a potent "influence in arresting the progress of settlement on the north of the gulf, in "sight of the finest fishing ground in the world, and including the best parts for "settlement. Yet such is even now the case; and many years ago many settlements "would have been established on the Labrador shores, if seignorial rights had "not frightened away hundreds who were disposed to establish a home there."

(ll) I am not sure that this view will be generally acquiesced in by publicists; as *imperium* has had a more confined signification given to it: but what is here laid down is consistent with the teachings of Grotius and of Heineccius, as well as supportable in principle.

(mm) MONTAIGNE. The moral sentiment is eloquently expanded and enforced by Massillon, bishop of Clermont:—"We do not owe "to all men the same cares, civilities, and attentions; but to all we "owe 'the truth.' The different situation that rank and birth give us "in the world, diversify our duties with regard to each other. That "of truth is in all situations the same. We owe it to the rich as "well as to the poor; to our inferiors, as well as to our masters; "to those who hate it, as well as to those who love it, and to those "who will use it against us, as well as to those who will use it for "themselves. There are times, when prudence permits us to dissi- "mulate or hide the love we have for our brethren; but there are "none, in which we are permitted to conceal 'the truth.' In fact, the "truth is not ours; we are but its witnesses, defenders and deposi- "taries. It is the light of God in man, which ought to illuminate "the whole world—"

(nn) Kant thus classed definable conventions:

"—the purpose of every contractor is, either—1. a unilateral acquisi- "tion (this is the gratuitous contract), or, 2. a bi-lateral acquisition (this "is the onerous contract), or, 3. guarantee of what is already his, "without acquisition (a guarantee which may be, at the same time, "gratuitous for one, and yet onerous for the other).

"The gratuitous contract is;

"*a.* keeping something entrusted *(depositum)*;

"*b.* loan of a thing *(commodatum)*;

"*c.* gift *(donatio)*.

"The onerous contract is;

"*a.* exchange, in the widest sense, subdivided into

"I. goods for goods, exchange;

"II. goods for money, purchase and sale;

"III. loan for consumption (*mutuum*), alienation of a thing on "condition of getting it back some day *in specie* (as, corn for corn, "money for money).

"*b.* the contract of letting (*locatio-conductio*), subdivided into,

"I. letting out a thing to one, for such use as he can get out of "it (*locatio rei*). If the restoration of the thing is to be *in specie* "only, 'interest' may be added as an onerous pact (*pactum* "*usurarium*).

"II. the letting out of labour (*locatio operæ*), that is to say, grant "of the use of my strength to another for a settled price (*merces*). "The labourer, in virtue of the contract, is the mercenary.

"III. the contract of mandate; procuration for and in name of "another. If the procuration be effected by simple substitution "for another, without use of the person's name whose place is taken, "it is a mere conduct of affairs (*gestio negotii*). If the procuration "be carried out in the name of the other, the principal, it is a man- "date. Here, as in letting, the contract is onerous (*mandatum* "*onerosum*.

"*c.* the contract of security;

"I. pledge with undertaking, simultaneous (*pignus*);

"II. suretyship, a promise given in support of a contractor's "promise (*fidejussio*);

"III. bail or hostage."

The juridical metaphysician has, in his instances of classification, availed himself of the Roman Law, the universal European model for illustration of jural science.

(*oo*) The distinct signification of this term is well indicated by its derivative compound, com-merce. A subject of commerce must have a price set on it—be appreciated, in the market. *Merx* was not applied to landed estate.

(*pp*) The nice requirements of 'consideration,' in the English simple-contract; the strict requisites in the *obligatio verbis* of ancient Rome; the precautions enforced in contracts relating to property of a British ship, in contracts protected by the English Statute of Frauds: these are familiar instances.

A passage in Professor Bell's 'Principles of the Law of Scotland,' under the head, 'conventional obligations,' exemplifies the arbitrary differences in different systems,—"The Law of Scotland does not "follow the Roman Law of *nudum pactum* on the one hand; nor "recognise the subtilties of the English Law on the other."

(*qq*) Justice Park in *Britten* v. *Hughes* 5 Bing.

The speech of Lord Eldon, which follows, is to be found in the case *Bromley* v. *Holland*, 7 Ves.

Lord Loughborough, when deciding that a contract to succeed another in a public office was void (because impolitic), said—"This agreement, resting on private contract and honor, may perhaps be fit to be "executed by the parties, but can only be enforced by considerations "which apply to their feelings, and is not the subject of an action. "The Law encourages no man to be unfaithful to his promise; but "legal obligations are, from their nature, more circumscribed than "moral duties."

(rr) See Kent's Commentaries (10th edit.) 2nd vol. p. 620, no. [1].

(ss) These several passages are somewhat differently rendered by Lord Kaimes, who quotes them in a note to his 'Law Tracts.'

(tt) To many the distich of Saadi will occur:

یا وفا خود نبود در عالم یا مگر کس درین زمانه نکرد

'Either real *wufah* (good faith) never was in this world, or, at least, no one now-a-days observes it.'

(uu) Thus it was in Rome. Beginning with the starch and tedious, but yet universal *nexus per æs et libram* ('bond by the brass and scales'), —which had no character of grossness, if rude; it rather indicated the rarity and little value of what was typified, to the 'men of the lance,'— and gradually fining down until the express abolition of 'law-formularies' A. U. C. 1095. The intermediate resolution of the Prætor, in the famous edict ('*Pacta conventa*——*servabo*'), was a virtual abolition of quirital despotism in matters of contract; thenceforth, the moral tie of good-faith in admission or observance of conventions was no longer totally alien from the jural ground of obligation.

The significance of contract-formalities will be further enlarged on under the head of 'alienation.'

SECTION VI.

THE FAMILY, NATURAL AND CIVIL: CIVIL SUBSTITUTES OR COPIES OF FAMILY RELATIONSHIP.

From those familiar and uniform relations which constitute primary society, which are the basis and type of (foreshadowing) civil or political society, necessarily arise civil modes of Right and obligation, *i. e.* civil status: nor is any chapter of a nation's Law more characteristic of national bent or more likely to exemplify the standard of a nation's conscience.

'The family' is a concrete name for the class or aggregate of relations now referred to. The family is not a civil creation, nor, in its main incidents, even exclusively human. But, civil laws, building upon the ordinance of Nature, construct and organise status relations, which represent and constitute the family.

Each civil system differs, more or less, from the prototype: either, deepening and extending (while following) the simple lines tracked out by Nature, or, diverging and deviating into artificial ways; at times so diverging and deviating as virtually to supersede (never obliterating) Nature's track.[a]

Family status is essentially one, in character as in origin: each subdivision or branch however, each instance or phase of the relation, has, in every system, its several incidents and properties, although growing from one root, attached and supplemental to one stem, *viz.* the marriage tie.

MARRIAGE.

Marriage, matrimony, wedlock, is, the coming together of the sexes, under a contract or legal *vinculum*, for procreation and nurture of children.

Being a contract, all general rules of contract (noted in the last Section) are applicable to this 'coming together'—con-vention.

Therefore, the views, the formalities prescribed and adopted in each civil system, determine what is and what is not a legal marriage. In one place, at one time, a particular religious form, or a technical ceremony is insisted on; elsewhere or in another epoch special publication or registry; it has occurred and does occur, that form and ceremony are dispensed with, the substance and intrinsic meaning of the marriage connection being alone regarded. (b)

In so far then, the jural tie of marriage, the proceeding, the union of wills accomplished in the marriage status, is strictly identical with 'contract'. In regard however to its universality and necessity, to its being but a reduction into order and adaptation to circumstance, of Nature's impulses, marriage bears a close analogy to 'property'—and this, without reference to marital domination.

As Reason modifies, extends, refines upon the general rule, the indefinite necessity of property; so do we find the simple primary idea of marriage modified and adapted to the wants, the temptations, the habits of various races, in varying schemes of civil Law.

The two institutions combined, may well be supposed to embrace all ordinary social requirements.

"The component parts of a house (*oikos*) are a "man and property.—But as to man, the first "object of his care should be respecting a wife."

So Aristotle; who quotes the old poet Hesiod,

"first house, then wife, then oxen for the plough."

and he admirably (for his Time remarkably) treats of marriage and its duties as of a condition, towards which mankind are "divinely predisposed." —"For the sexes are at once divided, in that "neither of them have powers adequate for all "purposes, nay, in some respects even opposite to "each other, though they tend to the same end. "For nature has made the one sex stronger and "the other weaker, that the one by reason of "fear may be more adapted to preserve property, "while the other, by reason of its fortitude, may "be disposed to repel assaults; and that one may "provide things abroad, while the other preserves "them at home. And with respect to labour, "the one is by nature capable of attending to "domestic duties, but weak as to matters out of "doors; the other is ill adapted to works where "repose is necessary, but able to perform those "which demand exercise. And with respect to "children, the bearing of them belongs to one "sex, but the advantage of them is common to "both; for the one has to rear them, and the "other to educate them."

The marriage union, being, in its general scope,

*

a normal result of human desires and of human association, is, considered civilly, a plan of restraint, an orderly and decent method of observance in regard to the sexual instinct. It is the assertion of Reason's prerogative in control of animal appetite. Further, marriage is an ordinance and scheme for preservation of infant life, for education (in a comprehensive sense) of human progeny. Marriage has also special value in civil polity, as indicative of paternity. Montesquieu enlarges on this:

"Among civilized nations, the father is that person "on whom the laws, by the ceremony of marriage, "have fixed this duty; because they find in him "the man they want. Amongst brutes, this is an "obligation which the mother can generally perform; "but it is much more extensive amongst men. "Their children indeed have reason; but this comes "only by slow degrees. It is not sufficient to nourish "them; they can already live; but they cannot "govern themselves. Illicit conjunctions contribute "but little to the propagation of the species. The "father, who is under a natural obligation to nourish "and educate his children, is not then fixed; and "the mother, with whom the obligation remains, "finds a thousand obstacles, from shame, remorse, "the constraint of her sex and the rigour of laws; "and besides, she generally wants the means." (c)

As an improvement or orderly development of Nature's ordinance, marriage, how variously soever organised and regulated, has two aspects, several, though each and together tending to one end.

The first and obvious aspect is, the purely moral,

social and personal, *viz.* satisfaction of human craving for a specific sympathy, companionship, aid, comfort—such as can be no otherwise sufficiently or fairly met and satisfied than in orderly conjugal union.

Neither history nor observation furnishes a deduction, that, among mankind, conjugal society is urged by no other want than the 'lust of the flesh,' even combined with desire of progeny. Each undepraved, unspoilt man or woman, however simple and rude, ever seems conscious of a moral incompleteness, capable of being supplied by (therefore demanding) conjugal society; understanding by 'conjugal,' no mere casual nor temporary nor optional yoke or tie. (d)

The second aspect of the marriage institution is political. Under whatever conditions, however disguised, mistaken, or corrupted, the form in which the institution may appear among a people—whether under the polyandry of some few eccentric races, as the Moplas of Malabar; the more frequent phase of polygamy; even with the licensed though covert libertinism of ancient Sparta; (e) or, whether under the most rigid dogmatic enforcement of a monogamic regimen; (f) every State regards and uses the institution as an agent to carry out its own policy, to extend its rule, to continue (in a manner consonant to the religious, moral and intellectual attainments of that people) the community and its institutions to future times, reining or giving way to the instincts

and passions of men just as the general feeling or the views of those in power may incline. (g)

With whatever artificial attributes the policy or requirements of particular civil communities may clothe family relations, it is undoubted, that the social conduct and duties of husbands, fathers, sons and brothers, as such, are invariably a part or enter into the spirit and composition of every system of laws, and are moreover always defined and interpreted in precise conformity with the estimate and ideas of each nation as to what that conduct ought, morally or religiously, to be. The precise acts required from or justified in a good father, in a good son, often differ with different people: but the quality of goodness, as of badness, is ever measured and ascertained, plainly, by the moral sense, without artificial element or bias—unless indeed the influence of religious or of *quasi*-religious dogmas be considered an artificial element. (h)

Jural obligations and rights incident or proper to marriage, range under three heads; 1. conjugal rights, *i. e.* the *consortium, concubitus,* personal communion, which is the primary condition and immediate purpose of the contract; 2. changes effected, in pre-existent or supervenient rights, *e. g.* of property; 3. personal obligations other than the *consortium,* but collateral to or consequent upon it. (i)

It may be considered as a general and primary quality or incident of the married status, that each associate (spouse) has a right, a *jus* (bearing some analogy to *jura utendi, fruendi,)* in the person and

to the society of the other one—a right significant of something less free or optional (as to the person bound) than mere alliance or co-partnery, yet nowise akin to a claim of servile subjection; it is a right that betokens, as it demands, a real subserviency, or at least adaptation, of will, of act, of mind—such as is proper and incident to this status—specially adapted to the objects, and growing from the intrinsic character of marriage.(j)

Jural or civil manifestations which cover essential incidents of the marriage contract and status, are variously expressed in varying civil schemes.

By the *Sheraa*, "—the husband has no power "to restrain his wife from going on a journey, or "from going abroad, or visiting her friends, until "such time as he shall have discharged the whole "of the *muhr modjil* or prompt dower; because a "husband's right to confine his wife at home is "solely for the sake of securing to himself the en-"joyment of her person, and his right to such "enjoyment does not exist until after the payment "of the return for it."(k)

Al Korân.—"Ye may divorce your wives twice; "and then either retain them with humanity, or dis-"miss them with kindness.—But if the husband "divorce her a third time, she shall not be lawful "for him again, until she marry another husband. "But if he also divorce her, it shall be no crime in "them, if they return to each other.—If ye be de-"sirous to exchange a wife for another wife, and ye "have already given one of them a talent, take not "away any thing therefrom—"

In the *Dharma Sastra* it is declared,

"Him to whom a woman's father has given her, "or her brother with paternal assent, let her ob- "sequiously honour, while he lives; and when he "dies, let her never neglect him." and,

"Though unobservant of approved usages, or "enamoured of another woman, or devoid of good "qualities, yet a husband must constantly be re- "vered as a god by a virtuous wife."

"Married women must be honoured and adorned "by their fathers and brethren, by their husbands, "and by the brethren of their husband—"

"Neither by sale nor desertion can a wife be "released from her husband." "Let mutual fidelity "continue till death: this, in few words, may be "considered as the supreme law between husband "and wife."

"No atonement is ordained for that man who "forsakes his own wife, through delusion of mind, "deserting her illegally—" (t)

In the *Code Napoleon*,

"The spouses have the reciprocal duty of "fidelity, relief, co-operation (*fidelité, secours, assist- "ance*). The husband owes protection to his wife, "the wife obedience to her husband. The wife "is bound to live with the husband, and to "follow him wherever he may think proper to "dwell: the husband is bound to receive her, "and to furnish her with everything necessary for "the purposes of life, according to his means and "condition."

Retributive vengeance—private sanction—accorded

or permitted against the accomplice in conjugal infidelity; judicial compensation to either spouse, against the stranger to whom is imputable deprivation of conjugal society; remedial restoration of that society, wrongfully withheld by either spouse, or, the alternative penalties for abandonment—by such indications, civil laws assert (different systems more or less determinately, and in various modes) the *quasi*-real right of a spouse in the other's person.[m]

Civil laws, as a rule, follow the suggestions of Nature in allotting to the male partner protection and superiority. "Moreover, it is manifest" wrote Heineccius, "that this society would be very im-"perfect, if it were equal in such a manner that "neither had the faculty of deciding in any com-"mon dispute; because it may happen, in many "cases, that the two may differ in their opinions "about the choice of means, and between two, in "such cases, the dispute would be endless: where-"fore, though the prudentest counsel ought to be "preferred, yet, because it would often be contro-"vertible which of the two parties in this society "was in the right, there is reason to approve the "common practice in this matter, and so to give "a certain prerogative to the husband about affairs "belonging to the common safety or advantage "of the society."

Al Korân.—"Men shall have the pre-eminence "above women, because of those advantages wherein "God hath caused the one of them to excel the

"other, and for that which they expend of their "substance in maintaining their wives. Wives "ought to be obedient, and keep the secrets of "their husbands, because that Heaven hath en- "trusted them to their care." (n)

Such a view must usually lead to a right of control, if not ownership, in the husband, of the material wealth or property of the married pair. This incident of the status was well expressed in the ancient Roman system by the terms *manus* and *potestas* ('hand' and 'power'); all claims and material benefits of the wife, as an individual, being at that epoch, as was her person, in subjection to the lord of her 'family' and 'house.'

So the English Common Law quaintly signifies, in its old Norman jargon, the relative position of the spouses, by the phrases 'baron' and 'feme-covert' (*i. e.* under cover or shelter of her lord). In these several systems the woman is civilly absorbed, her personality is transferred—for the purpose of outside civil dealings between the body politic and social, the 'man and wife', and their fellow citizens or others—to him who is alone civilly responsible for her acts, as he is, for the most part, owner of what would be hers, were she unmarried.

The English *feme-covert* or wife has lost her individuality: "all that she owns, all that comes to her, all that she earns, passes to the husband. (o) She cannot contract, save as his representative. He is lord of his wife's lands or realty (without

disposing power) during the marriage, *viz.* their joint lives, and on birth of issue, becomes a life-tenant, should he survive, *viz.* 'tenant by the curtesy of England.'

In Scottish Law, the wife's personality is not so completely absorbed. By equitable evasion in the English Law, and directly in other systems, a separate and peculiar class of property may always be secured to the wife, in respect of which she is regarded as free from the status and bond of marriage. Such is the Hindu *stri-dhana.* But, "A husband need not return to his wife *stri-*
"*dhana* appropriated by him during a famine, or in "order to perform sacred rites, or when suffering "from disease, or when in prison." (p)

The laws of France admit great latitude in the marriage contract as to the effect of the union upon the proprietary rights of the husband and wife respectively; but prohibit any stipulations that may "derogate either from the rights resulting from "the power of the husband over the person of his "wife and children, or those which appertain to "the husband as head—" (q)

With the Musulmans, union or confusion of property is no incident of marriage; which is, itself, but a *quasi* sale of the wife's person—the mere *jus concubitûs.*

Different systems provide differently for reciprocal contributions and joint responsibilities in respect of the common burdens of married life. The Roman *dos* was the contribution on the

woman's side: in the English and Scottish laws, the same word, or 'dower,' is also used to denote the converse interest, *viz.* what the man must or may relinquish to his partner. (r)

Where the civil scheme of marriage status admits of the spouses having several interests in property, so that each may exercise his or her individual will in its disposition, we sometimes find rules of protection against irrational or improvident bounty between themselves. (s)

Nature dictates the relations of the married pair to their offspring, and the several rights or offices of nurture, education and guardianship which each respectively should accord to the other. How civil systems have dealt with this class of conjugal rights, may be conveniently adverted to under the next division of family status.

MANU.—"The production of children, nurture of "them when produced, and the daily superinten- "dance of domestic affairs are peculiar to the wife."

PARENTAGE: THE FILIAL TIE.

The relation indicated by this double title, is, in its inception and full development, the end or purpose, natural and political, for which marriage is the instrument; as is apparent from the definition (above given) of marriage.

Offspring are either regarded and treated as the property of progenitors—virtually and *quodammodo*, if not absolutely—or, as wards entrusted to their

charge, or, in a manner partaking of each of those modes of relation and custody.

Further, the period of parental domination may terminate when or shortly after the child becomes adult; or, it may last indefinitely, even during the parent's life, as with the ancient Romans and with all patriarchal tribes. The terrors of the Jewish code for filial rebellion were not restricted to childhood; they were a portion of the general penal system, binding all: nor is it to children or minors only that the less severe penalties but equally imperative injunctions of China are addressed.[t] So may be said in regard to the Hindu, practically, though perhaps rather in an ethical than a jural sense.[u]

Of the ancient peoples of Scandinavia, the historian Geijer writes:

"The father of a family, on the pillars surrounding whose high seat were carved the images of the gods, was called himself, like the prince, *Drott*, and was priest, judge, and leader for his household.—As with the Greeks and Romans, and among all pagans, the father was free either to expose or bring up a new-born child; in the latter case he raised it from the earth in his arms, and had it sprinkled with water and named in the presence of his chief kinsmen."

Here is indicated proprietary dominion over the newly-born—an act, allowably, of passion or of caprice. But this dreadful option (of passive infanticide) does not itself prove, nor do I know of

any recorded proof, that with the earliest Roman, any more than the Israelite father, the most practically cruel tyranny (over a child once under nurture, and of which parental charge had been accepted) was avowed to be less or other than a *quasi*-judgment—a result of Law (not of caprice), a punishment or an ostensible necessity, the decree of a governor—if in theory autocratic, yet not wholly irresponsible. (v)

The most rational, the most practical, the most humane (and, in modern civilization, most admitted) construction of the paternal office, is, as of a domestic, a special magistrate—the type, the representative, the necessary supplement, of civil or political magistracy—entrusted with the charge, supervision, government of the future man and citizen, of whose existence he is the immediate cause. Well observed Bentham—"The domestic governor may protect "those subject to his authority from knowledge "which may do them harm; he can watch over "their social intercourse and their studies; he can "accelerate or retard the progress of their enlight- "enment, according to circumstances. This con- "tinual exercise of power, which would be liable "to so many abuses in a State, is much less so in "a family; for the father and mother have a na- "tural affection for their children, far stronger "than that of the civil magistrate for those whom "he governs. On their part, indulgence is gene- "rally the prompting of nature, while severity "is the effect of reflection. Domestic govern-

"ment can employ punishments in many cases "where the civil authority cannot; for the head "of a family deals with individuals, while the "legislator can only act upon classes. The one "proceeds upon certainties, the other upon pre- "sumptions. A certain astronomer may be capa- "ble, perhaps, of resolving the problem of longitude, "but can the civil magistrate know it? Can he "command this discovery, and punish him for not "making it? But a particular instructor will be "likely to know whether a given problem of ele- "mentary geometry is level to the capacity of his "pupil. Though idleness assume the mask of in- "capacity, the instructor will hardly be deceived; "in such cases the magistrate is sure to be deceived. "It is the same with most of the vices. The "public magistrate cannot repress them, because "if he attempted it he must have spies in every "family. The private magistrate, having under "his eye and his immediate control those with "whose conduct he is charged, can arrest the be- "ginning of those vices of which the laws can "punish only the last excesses."

In Pufendorf's treatise, we find the ingenious (and not far-fetched) theory, that, like as the beneficial conduct of an absent friend's affairs without his knowledge, imposes upon him obligations, and, as it cannot but be presumed that, were infants or children capable of judgment, they would assent to parental care and control; so, the very absence of personal capability, and the need

of government, supplies—is an efficient substitute for—consensual reciprocity. 'The presumption of rational assent avails as express *consensus*.' 'For,' also says Pufendorf, 'these notions have no repugnancy, *viz.* that an obligation should owe its origin, at once, to a precept of natural Law and to a tacit consent.' (*w*)

The extent of dominical discretion—the degree of power, both to adjudicate, and to inflict sanctions, confided or left to the domestic and social governor, must vary with the activity and character of State-interference, of State-care, in educating the rising generation of citizens. In the artificial polity of Lycurgus, all training of youth was usurped by the political parent, the State; so that the functions of natural paternity could exist but in name. (*w*) Usually, State-power comes in to supervise and support, not to supersede the office of a father. Even to inflict the ultimate penalty, a Jewish parent but referred to civil authority, in order to execute his self-adjudicated sentence.

"If a man have a stubborn and rebellious son,
"which will not obey the voice of his father or
"the voice of his mother, and that, when they
"have chastened him will not hearken unto them;
"then shall his father and his mother lay hold
"on him and bring him out unto the elders of
"his city, and unto the gate of his place; and
"they shall say unto the elders of his city, this
"our son is stubborn and rebellious, he will not
"obey our voice, he is a glutton and a drunkard;

"and all the men of his city shall stone him with "stones, that he die." (x)

In the French system, a father desirous of imprisoning a refractory child under the age of 15 years, and who is in no way emancipated from his care, has but to demand a warrant of detention from judicial authority, without any exposition of his motives or his ground of complaint.

Nor can it be said, that a rule of government or the conduct of a political executive in this respect, is any measure of political progress, of backward or advanced civilisation: it evinces merely the cast and policy of the particular system.

Courts, Legislatures, and Public Authorities, as a rule, in these days, decline all needless interference with morally defined family functions.

It scarcely need be noted, that, to provide his children with sustenance, at least during childhood and personal incapacity, is a civil obligation of the parent.

To lead on the mind in its early efforts, to train it, and if possible to wean it from the ever-ready guidance of ignorance and false impulses—is the special privilege and the highest duty of parents. Obviously, fulfilment of this duty concerns the welfare and must be of vital importance to the very being of a State: inasmuch as instruction and the discipline fitted for childhood, are direct means to forestal the action of penal laws, indeed 'of all' jural sanctions; while neglect or absence of those means must have, normally, a

converse operation. This duty is occasionally, as in Prussia (—at least, co-operation with State-efforts—) directly enforced: more usually, it is urged and invited, actively encouraged and assisted. (y)

Parental duties are mutual, joint, alternative: as a rule, they are conjugal, *i. e.* incumbent on the pair, not peculiar to either parent—except, indeed, for convenience and in respect of physical capabilities. The duties of nurture, sustenance, provision, bringing up, cannot be shifted from one to the other, as duties; though the mode and means of performance may differ with each. Nature has endowed the female with a rich aliment for her babe, with special adaptations for its tender care, with a finer sympathy for its little wants (perceptible only to the maternal sense); she has fitted the male to protect, to represent the home, to labour, to devise schemes of family provision, to preside over and to guide. From these general rules of natural provision arises a facility for division of labour, rather than any distinct separation of parental obligations.

Civil laws recognise, sometimes allot the fitting position of each parent; according to the social policy of each system.

MANU—"Let the father alone support his son—"

Until very lately, the English rule was severely strict; the mother could not, under any circumstances, assert a claim of custody or control (except where very tender infancy created a physical necessity), not even of society, but with assent and

by indulgence of the father, in whom was the exclusive parental right. And, in an American case, the rule was held, as between husband and wife, to be so imperative, that the husband could not, by agreement with the wife, alienate to her his right to the custody of their children, and that such agreement was void.

This severity has been materially qualified by a statute of the present reign, which, in effect, deprives a father of the power, tyrannously to ignore the natural right of his children's mother to their society.——"When" said the Lord Chancellor, in a case where the provisions of that law were enforced, "the Court sees, that the maternal "feelings are tortured for the purpose of obtain-"ing anything like an unjust advantage over "the mother, that is a case in which it ought to "interfere."

By the Law of Massachusetts, the rule is, that the happiness and welfare of the children is to determine the custody in which they shall be placed, and the respective rights of the parents shall, in the absence of misconduct, be regarded as equal.

The French code gives exclusive rule and responsibility to the father, while present; in his absence, the parental function vests in the mother, but, for its exercise, she has occasionally to call in aid a council of paternal relatives. (z)

The English peremptory remedy in vindication of personal liberty, *viz.* the *habeas corpus* writ, is

available on behalf of a child, to try the legality of the child's detention, by any one—as well as on behalf of a parent or other person, who may claim to resume, or be entitled to, the custody. The question for the tribunal before whom the child is brought by that legal process, is one of discretion and equity: an intelligent child's inclinations are consulted; there is every consideration of what is expedient, as well as of the mere jural right.

The power left to, or conferred upon sons to have and to deal with property, to contract, to act in any respect as citizens *sui juris*, must be (as in case of the wife) a question of special civil regulation; combining the policy of parental power, with the general question of civil minority and the protection thrown around those really or presumptively incapable of self-guidance.

The growth of the *peculium* or exceptional property of sons with the Romans, is one of the many proofs, to be found in all formal jurisprudence, of the inevitable relaxation in practice to which rules of policy and Law are subjected, with the growth of social exigencies and varying manners. Habit and social progress are stronger than the fetters of jural formality: they are powerful elements of heat and expansion, which loosen and permeate all artificial schemes of life and conduct.

Where children result from a union which is not 'marriage', in other words, are procreated under conditions which the Law (to which the parents

are subject) declares illegal, they are 'illegitimate,' 'natural' (as opposed to 'civil')—in Roman phrase, not *justi liberi*. The status of such children is governed, in each jural system, by two principles or requirements, 1. ascertainment of the person or persons clothed with the parental obligations, 2. discouragement of irregular and illegal sexual concourse.

Illegitimate sons, in Athens, were excluded from the paternal *phratria* (social class and rank), and from succession to property; but they might be legitimized by a kind of adoption, and thus admitted to all rights political and social, "at least" writes Hermann, "when the father had not other "strictly legitimate children."

So, later Roman jurisprudence, as well as modern systems avowedly based on the *Jus Civile*, have permitted an amelioration of the birth-status of those who derive from their parents a lower civil and social position than is held by their fellow citizens of the same class who are born in wedlock. Their original illegitimacy may be cured by 'legitimation.' In Scotland, "A lawful child is one born in wed-"lock, or within a certain time after the dissolution "of the marriage; or born of parents who, at the "conception, were under no impediment to marry, "and have since intermarried." (aa)

The peculiarity of the English Common Law in this respect, *viz.* in denying complete alleviation for the birth-wrong of illegitimacy, may be considered an historical accident, caused by

jealousy of Romish ecclesiastical domination or interference. (bb)

The technical brand (descended from Rome, but misapplied or wrongly generalised in modern jural language,) of, 'no man's son,' and 'son of the people,' is now seldom applied to the child of unlicensed birth. Supported by the dogmatic morality of the middle ages, such needless, cruel and very impolitic harshness of (what may be termed) jural ethics, has disappeared before the practical conscience, the safer and less fettered jurisprudence of modern Europe. "With the exception" writes Kent, "of the right of inheritance and succession, "bastards, by the English law, as well as by the "law of France, Spain, and Italy, are put upon "an equal footing with their fellow-subjects; and "in this country [America] we have made very "considerable advances towards giving them also "the capacity to inherit, by admitting them to "possess heritable blood." (cc)

ADOPTION.

Nature only can make a parent; and impotency or accident may disappoint those anxious to become parents, or, it may happen that a parent is disappointed by the uniformity of sex among his (perhaps numerous) progeny. It may almost be said, that Nature dictates an obvious remedy and consolation for every such disappointment, *viz.* transfer of the parental relation.

"Adoption," says Hermann, of the Athenians,

"was not considered as a mere right, but as a "duty which, if omitted by the childless person, "was usually performed after his death by his "nearest relatives, lest his race, and its peculiar "*sacra* should become extinct, a circumstance to "which the State itself was by no means indiffer- "ent."

By *adoptio* the Roman accepted a subjection to or transfer of family dominion, in order to preserve his lineage and family-rites (*gens et sacra privata*). A father might even thus take to himself his own emancipated child. 'Dost desire that Publius Fonteius have life and death *potestas* over thee, as a son?'—is the recorded official interrogatory put to one about to be 'arrogated' by (*i. e.* one *sui juris* about to become as a son to)—say, P. Fonteius. The transfer from one *paterfamilias* to another, of son or daughter, grandson or grand-daughter, was effected as a transfer of proprietary right. Although but an artificial and civil agnation was produced, fitness of things was considered; for instance, a born eunuch could not adopt, inasmuch as the relation simulated could not possibly have been real.

The most artificial, as it is the most significant and mystical, system of civil filiation, is that of the Hindu Sastras. "Filial relation" says the author of *Dattaka Chandrika*, "proceeds from ini- "tiatory rites—" and, "Neither can it be said, that "paternal right proceeds alone, from the relation, as "natural father—" Yet, "the relation, as *sapíndá*,

"of sons given, purchased, and the rest, to the "natural parent, continues; by gift and so forth "even, that does not fail; for, by reason of con- "sisting in connection through containing portions "of the natural father, it is not possibly to be "removed while the body lasts." (dd) Thus, as with the Romans, some sort of (though here, not a well-defined) distinction is admitted between filiation of blood, and a civil or ceremonial filiation. The Sastras, however, recognize consanguinity of an indirect kind, *viz.* son of the wife or widow by an appointed relative, wife's son by one unknown, damsel's son, son by the widow's second marriage. Here was (ee) cognate sonship without either procreation or formal adoption. The gift-son, &c. are substituted sons, so made by adoptive rites.

With Hindus, impotency, so far from being an objection to the adoptive act or power, is a special ground and necessity—a doctrine that exemplifies the distinction between their mystical sonship and the merely civil substitution of western codes. (ff)

The 'son of two fathers' of hinduism bears some analogy to the adoption introduced by Justinian, whereby a son given to a stranger, whilst incurring new civil relationship did not forfeit that of birth.

Artificial filiation is unknown to English jurisprudence; but is admitted in France, under peculiar modifications; *viz.*

Art. 343, "Adoption is not permitted but to "persons of either sex, upwards of fifty years of

"age, who shall not have, at the time of adoption, "legitimate children, or descendants, and who shall "be at least fifteen years older than the persons "whom they propose to adopt."

Art. 345. "The power of adopting can be "exercised only in favor of an individual to whom, "during his minority and for six years at the least, "the party adopting shall have furnished assistance "and bestowed unremitting care, or in favor of one "who shall have saved the life of the adopter, either "in battle, or by rescuing him from the flames or "the waters. In this second instance, it suffices, "that the adopter have attained majority, be older "than the adopted, without legitimate children or "descendants, and, if married, that his wife consent "to the adoption."

Art. 364. "In no case can adoption take place "before the adopted has attained majority.—"

TUTELAGE: WARDSHIP.

This too is a jural relation of which paternity is the prototype and original. Children and others may need, that the State, the political, supervising parent of an entire people, furnish a substitute for natural paternity. An able exposition of 'The sphere and duties of Government' thus deals with this function of State:—

"To whose care the superintendence of the chil- "dren's training must fall, after the death of the "parents, is not so clearly determined by the princi- "ples of natural right. Thence, it becomes the duty

"of the State to decide distinctly on which of the "kinsmen the guardianship is to devolve; or, if none "of these should be in a condition to undertake "the discharge of this duty, to declare how one of "the other citizens may be chosen for the trust. It "must likewise determine what are the necessary "qualifications for guardianship. Since the guar- "dians appointed undertake all the duties which "belonged to the parents, they also enter on all "their accompanying rights; but as, in any case, "they do not stand in so close a relationship to "their wards, they cannot lay claim to an equal "degree of confidence, and the State must therefore "double its vigilance with regard to the performance "of their duties.———What we have here observed "respecting minors, applies also to the provisions to "be made in the case of idiots and madmen. The "difference chiefly consists in this, that these do "not require education and training (unless we "apply this name to the efforts made to restore "them to the use of their Reason), but only care "and supervision; that in their case, moreover, it "is principally the injury they might do to others "which is to be prevented, and that they are gener- "ally in a condition which forbids the enjoyment "either of their personal powers or fortunes. It is "only necessary to observe, with regard to these, "that as the return to Reason is yet possible, the "temporary exercise of their rights is all that should "be taken from them, and not those rights them- "selves." (gg)

Females have been often, merely because of sex, classed among the helpless (or, may be, the unsafe,) who need tutelage, guardianship. This is emphatically so with the Hindus:—

MANU—"In childhood must a female be dependent "on her father; in youth on her husband; her lord "being dead, on her sons; if she have no sons, on "the near kinsmen of her husband; if he left no "kinsmen, on those of her father: if she have no "paternal kinsmen, on the sovereign: a woman must "never seek independence."

Among the Athenians, "Women were, in fact, "throughout their life in a state of nonage, and "could not be parties to any act of importance without the concurrence of their guardians, whose "place the husband naturally supplied during his "life-time." (hh)

With the earliest Romans, women were under perpetual domination or tutelage: not so in the latter days even of the Republic; (ii) and a Constitution of the emperor Constantine expressly equalised the sexes, in exercise of private civil rights, with however one exception. (kk)

Social usage must always limit feminine members of the community to a narrower—at least a differing—range of action and duties from those of men. This difference is most marked in the exclusion (as a rule) of the former from military, priestly, and political or governing functions. But, in modern jurisprudence, the civil rights of a woman, as such (without reference to marriage), *e. g.* to

hold, to alienate and deal with property, are in no wise crippled, nor lower than they would be in a man of the same position and under the same circumstances. A sane, adult, single woman is her own guardian, and unshackled.

'Tutelage' is derived from *tueor*, to preserve, to guard: the term has special and primary reference to personal, even moral guidance—secondarily, to charge of the pupil's or ward's external rights and property. The technical significance of *tutela* in the *Jus Civile* is indicated by the name given to a tutor's action or aid, *viz. auctoritas* (from *augeo*, to increase, add to); inasmuch as what the minor or pupil could do or attempt, being augmented by the tutor's supplementary act and confirmation, the two together constituted a complete civil act.

Fathers are permitted to delegate their Right of guardianship, wholly or partially, during their own lives or when death has bereft their children of natural protection; always however under State supervision and the control of civil rules.

XII Tables—"As the father has ordained [by "last will] concerning—the *tutela* of what belongs "to him; so let the law be! If he die without "disposition, and there be no [adult] son, let the "next civil relative take the *familia!*"

In the French code: "when a minor, not eman- "cipated, is without father or mother, and no tutor "has been selected by his parents, and he has no "elder relatives in the male line—he is to be

"provided, on the nomination of a family council, "with a tutor."

Al Korân—"Examine the orphans until they "attain the age of marriage: but if ye perceive "they are able to manage their affairs well, de- "liver their substance unto them; and waste it "not extravagantly or hastily, because they grow "up." (*ll*)

MANU—"The property of a student and of an "infant, whether by descent or otherwise, let the "monarch hold in his custody, until the owner "shall have ended his studentship, or until his "infancy shall have ceased." So that, by the letter of the Sastras, guardianship of minors is a State nomination in each case.(*mm*)

Law should and usually does protect and aid, within rational limits, the infirm of mind and purpose, the silly, the weak and demoralised, from obvious dangers that beset them (and beset those having to do with them) in social and civil intercourse. But, one appointed to supply the care and capability needed for charge and use of property owned by the insane or the incompetent, is in a different class or category from the protector of the infant or the minor.

XII Tables—"If there be a madman or a "squanderer, who is not in charge of any one let "authority over him and over his goods be with "his nearest relatives!"

Roman Prætor's injunction to prodigal heir:— "Since, by vicious courses, thou art wasting thy

"patrimony and ancestral possessions, and bringest "thy children to want; therefore I interdict thee "from use of money and from business!"—and a *curator* was accordingly appointed.

Al Korân—"And give not unto those who are "weak of understanding the substance which God "hath appointed you to preserve for them; but "maintain them thereout and clothe them, and "speak kindly unto them!"—a text seemingly of general application. (nn)

(a) *e. g.* the Roman *familia*, where all social and natural feeling, ostensibly and for civil uses, succumbed to the *potestas*.

(b) The application and significance of form or ceremonial in marriage was exhaustively treated by Lord Stowell in the leading case of *Dalrymple* v. *Dalrymple*. I extract some sentences of the judgment.

"Marriage in its origin is a contract of natural Law; it may "exist between two individuals of different sexes, although no "third person existed in the world, as happened in the case of "the common ancestors of mankind: it is the parent, not the "child, of civil society, *Principium urbis et quasi seminarium* "*reipublicæ*. In civil society it becomes a civil contract, regulated "and prescribed by Law, and endowed with civil consequences. In "civilized countries, acting under a sense of the force of sacred "obligations, it has had the sanctions of religion superadded. "It then becomes a religious, as well as a natural, and civil contract; "for it is a great mistake to suppose that, because it is the one, "therefore it may not likewise be the other. Heaven itself is "made a party to the contract, and the consent of the individuals, "pledged to each other, is ratified and consecrated by a vow "to God. It was natural enough that such a contract should, under "the religious system which prevailed in Europe, fall under eccle-"siastical notice and cognizance, with respect both to its theolo-"gical and its legal constitution; though it is not unworthy of "remark that, amidst the manifold ritual provisions made by "the Divine Lawgiver of the Jews, for various offices and trans-"actions of life, there is no ceremony prescribed for the celebration "of marriage. In the Christian church, marriage was elevated

"in a later age to the dignity of a sacrament, in consequence of "its divine institution, and of some expressions of high and mys- "terious import respecting it contained in the sacred writings."

On the same occasion Lord Stowell remarked,—"It depends "entirely upon the Law of the country, whether it is justly to be "styled an irregular marriage. In some countries only one form "of contracting marriage is acknowledged, as in our own, with "the exception of particular indulgences to persons of certain "religious persuasions: saving those exceptions, all marriages not "celebrated according to the prescribed form, are mere nullities; "there is and can be no such thing in this country as an irregular "marriage. In some other countries, all modes of exchanging "consent being equally legal, all marriages are on that account "equally regular. In other countries, a form is recommended and "sanctioned, but with a toleration and acknowledgment of other "more private modes of effecting the same purpose, though "under some discountenance of the Law, on account of the non- "conformity to the order that is established."

The normal modes of marriage in ancient Rome, were three; *viz.* by religious ceremonial *(confarreatio);* commercially, as an alienation, the wife being treated as a thing bought *(coemptio);* and 3dly by mere prescriptive use of the woman, as of an ordinary subject of property. Each of those modes brought the wife permanently under the *manus* of the husband, and conferred the *patria potestas.* But marital domination declined even during the republic; and the old forms fell into desuetude (leaving merely the real contract, implied in *ducere uxorem*), not as a reform, but with the growth of licentious habits. Rituals and *usus* gave place to mere property arrangements and festive celebration. Hence Juvenal suggests to the husband likely to be dissatisfied with her "irrevocably joined "to him by formal legal instruments *(legitimis tabellis)*"

"Why wed at all? why waste the wine and cakes
"The queasy-stomach'd guest at parting takes?
"And the rich present, which the bridal right
"Claims———?" (*Gifford*)

There was, under the empire, another customary, recognised mode of union of the sexes, having no civil or political significance, therefore less honorable, but neither illegal nor immoral, and so far supported, *viz. concubinatus.* The specialty of the marriage called 'morganatic' and 'left-handed' among feudal nations, consisted rather in the rank of the wife and the claims of herself and children upon the husband's property, than in any want of

binding force or other character of the union. The foreign term etymologically signifies, morning-gift, *i. e.* after consummation.

Among Hindus, the necessity of following minute directions of the *Dharma-Sastras*, as to domestic and social conduct; the sacred duty for each male to found a family—being dogmas or imperative precepts, of paramount and supernatural authority—invest the status of marriage with a special character unknown to other peoples.

"To be mothers, were women created; to be fathers, men." (MANU)

This, in object and character, is analogous to the primitive Divine invitation of the Bible, 'Be fruitful and multiply and replenish the Earth!'; but to the Hindu it is one of a class of warnings and injunctions under imperative and terrific sanction. In effect, in influence, the denunciation of the *Rishis* has been and is infinitely more effective than was the famous *lex Papia Poppœa* with its varied civil penalties and privileges.

The *Sastras* ingeniously adapt requirement to circumstances: *bráhma*, *prájápatya* or *káya*, and *daiva*, are simple though solemn modes of receiving a bride from her father, the latter through the intervention of a priest and religious forms; *árcha* where gift of the damsel is preceded by a certain offering to the father, *viz.* a pair of kine; *ásura*, where the father and relatives of the bride are conciliated by considerable presents, in proportion to the bridegroom's means; *gándharva*, when the union is what in Europe is called, a love-match; *rákshasa*, capture of a maiden in war; *paisácha*, where a man by stratagem succeeds in possessing himself of the person of the woman of his choice. These are described, "eight "forms of the nuptial ceremony used by the four classes, some good "and some bad in this world and in the next." and, "—the "ceremonies of *paisácha* and *ásura* must never be performed." and, "Some consider the four first only as approved in the case "of a priest; one *rákshasa*, as peculiar to a soldier; and that of "*ásura*, to a mercantile and servile man." (MANU.)

The *Sastras* give no general license of polygamy. Supersession of a wife (by infliction of a rival) is resorted to with reluctance and as a duty, exceptionally: see Manu, ch. ix. sl. 80, &c.

As to satisfying the scruples and dogmatic persuasions of men, learned or simple, by any merely civil rules—inasmuch as under the same civil sway sectarian variety of opinion must usually prevail—it is a futile attempt and expectation. Of this, an accurate and amusing illustration is given by Galt in his *Ayrshire legatees*,

where, the Rev. Zachariah Pringle thus communicates to his Scottish correspondent a marriage, in the heterodox English capital, of one of his presbyterian flock :—

" Anent the marriage of Rachel Pringle, it may be needful in me " to state, for the satisfaction of my people, that although by stress " of law we were obligated to conform to the practice of the epis- " copalians, by taking out a bishop's license, and going to their church " and vowing, in a pagan fashion, before their altars, which are " abomination to the Lord; yet, when the young folk came home, " I made them stand up and be married again before me, according " to all regular marriages in our national church. For this I had two " reasons; first, to satisfy myself that there had been a true and " real marriage; and, secondly, to remove the doubt of the former " ceremony being sufficient; for marriage being of divine appoint- " ment, and the English form and ritual being a thing established " by Act of Parliament, which is of human ordination, I was not " sure that marriage performed according to a human enactment " could be a fulfilment of a divine ordinance."

(c) All history supports the traditional existence of the family, in the remotest—what, therefore, we may term the primitive—condition of our race. Now, there can be no 'family', not merely in a civil, but in any definite sense, where paternity is not recognised or specific. Paternity is the key-stone of patriarchal and primary society; and when the fact of paternity ceases, generally, to be a question or doubtful among a people, marriage is, by that fact, indicated, and has assumed the rank and importance of a status, natural, civil and political. For then we have, father, mother, child, and *res familiaris—oikos*: "then only" runs the precept of Hinduism, " is a man perfect, when he con- " sists of, his wife, himself and his son." (MANU.) Under such circumstances, moreover, is seen the established idea and rule of female continence, as incident to contractual—not merely sexual—union. The conclusion is inevitable, that, restricted and orderly indulgence of a natural appetite (implied in marriage) must have been, as organised property was, among the earliest, if not the earliest of the manifestations or applied efforts of Reason. With this, however, consists the collateral and yet more patent truth, that, habitual and shameful varieties—often national—in sexual intercourse—in neglect or corrupt diversion of the marriage impulse—in promiscuous and indefinite procreations, have abounded. But little moral reasoning is needed to demonstrate, that such instances—however and wherever prevalent—are exceptional, in the record of Man's progress and tendencies.

(d) There is much in the private and personal aspect of marriage-union which is and must be a mere matter of conscience, *i. e.* irrespective of civil laws as of conventional modes. This view is supported by the fact of the deference paid by the Law of every people, in the regulation of marriage, (*e. g.* as to conditions of the contract and what is seemly in conduct,) to religious convictions, both dogmatical and ethical. A man's religion must be, intrinsically and strictly, an individual consideration, actively urged through his conscience. What he deems a warrantable, a convenient and a rational method of satisfying the desire which may well be termed, marriage-impulse, is, to him, of deeper and wider significance than either political or social dictates. Thus it is we ever find, that, within the pale of each State's laws (occasionally even beyond that pale) unions of the sexes take place, scarcely to be classed as casual or undeliberate, which set at nought, no less jural *vincula* and jural modes, than they do the decrees of fashion and of social opinion. Such erratic instances are of necessity tolerated, while condemned. For their ethical character or excuse, no general rule or dogma can avail: each case has its idiosyncrasy. As to their reception in social circles, the least that can be said is—it is as though one were grossly to violate recognised modes of dress or of living, *e. g.* methodically devoting the night to the business and pleasures of life, and sleeping by day—or, going with bare limbs among a clothed and booted people—thus, or in any away repudiating the manners of one's nation and unfurling a standard of one's own. No one with impunity is singular, however conscientiously or even rationally: social despotism seldom allows a margin for corrective or conscientious irregularities.

(e) Heeren thus apologises for the loose conjugal morality of Lycurgus. "The complete organization of domestic society in "relation both to husband and wife, parents and children, which was "so framed as to further, even at the cost of morality, the grand "political object, the production of vigorous and healthy citizens."

(f) Or, may be, the unforced virtue of a people. Gilbert Stuart says of the ancient, the simple and warlike Germans;—"They "were unacquainted with that softer luxury which more delicious "climates introduce into society, and neither indulged a plurality of "wives, nor prohibited their women to attend them to the field, "to assist in their councils and to be useful and active in the "different occupations which employed them. For gallantry, accom-"modating every thing to the standard of pleasure, had not yet

"turned the sex from business, or made it the object of a criminal "voluptuousness."

(g) It is no metaphor nor fanciful, to describe marriage, as having for aim and object, the future, *viz.* an ultimate design, of which the present is but a mean; for it is a foundation laid in the interest and contemplation of a community that is to be, the now actors forging, the while, links of a social and civil chain, to be continually added to, varied, renewed, under like conditions, by other actors yet unborn—actors in successive marriage unions.

Several considerations germane to the topic of marriage here present themselves, perhaps strictly belonging rather to the task of legislation or artificial adaptation of laws to a people, than to jurisprudence. Whether singleness and permanency are intrinsically of the essence of marriage—or (which is virtually the same), whether, those qualities being so regarded by the majority of civilised nationalities, excludes polygamists, as well as those temporarily (or for such time as one or either spouse shall choose) mated with the other sex, from the juridical class and status of the married, *viz.* on the ground, that such associations are merely abnormal facts and eccentric deviations from principles upon which (as those nations hold) the universal science of Law is based—this paramount consideration is yet among the doubts of the politico-moralist of the most advanced school. The judicial *dicta* following illustrate the dilemma and the class of doubts to which this question belongs:—

Lord Brougham—"If there go two things under one and the same "name in different countries—if that which is called marriage is of "a different nature in each—there may be some room for holding "that we are to consider the thing to which the parties have bound "themselves according to its legal acceptance in the country "where the obligation was contracted." and "—all that the Courts of "one country have to determine is, whether or not the thing called "marriage, that known relation of persons, that relation which those "Courts are acquainted with, and know how to deal with, has been "validly contracted in the other country where the parties professed "to bind themselves." Ld. Robertson—"Although a marriage which "is contracted according to the *lex loci*, will be valid all the "world over, and although many of the obligations incident to it "are left to be regulated solely by the agreement of the parties; "yet many of the rights, duties, and obligations arising from it, "are so important to the best interests of morality and good "government, that the parties have no control over them; but they

"are regulated and enforced by the Public Law, which is imperative "on all who are domiciled within its jurisdiction, and which "cannot be controlled or affected by the circumstance, that the "marriage was celebrated in a country where the Law is different." "and "—a party who is domiciled here, cannot be permitted to "import into this country a law peculiar to his own case, and which "is in opposition to those great and important public laws which "our legislature has held to be essentially connected with the best "interests of society." The principle enunciated by this Scottish judge applies to all obligations and jural results of the alleged marriage status. In fine, this is one of that class of cases where the status or condition of an individual, upon which his rights or immunities depend, is defined or arrived at differently in his foreign domicil —according to which as a general rule, his personal condition would be adjudicated, *viz.* by the comity of nations—from the mode adopted in the country where the litigated question arises. The only difficulty is, the admission or ascertainment of that status—and how this is to be done, is regulated by the *lex fori* (the law of the tribunal, *e. g.* in an English Court, the English law). "We could "not" observes an able living writer on subjects of Public Law (Westlake), "recognize polygamy in christian Europe or America, on "the ground that the plural marriages were contracted in Turkey and by "Turks." Still, in British dependencies, personal laws which happen to authorise polygamy, are of the *leges fori;* upon which ground, between certain British subjects, in those places, the condemned anti-christian usage, being included and admissible under such personal laws, is, by christian judges, daily sanctioned and supported. Were the question, however, recognition of slavery, or of a right of infanticide, or of sanction to marriage between uterine brother and sister, no construction of the *comitas gentium*, nor even any general adoption of a class of laws, would effectually impose those barbarous outrages of humanity, as jural usage, upon the consciences of our judges. See remarks of an American Court,— Story, *Conflict of Laws* § 116.

As to the grave and anxious consideration of forced continuance or indissolubility of the marriage bond—whether, like to the status (usually) of a priest, of one initiated in the mysteries of free-masonry, and other social or political orders, the seal of marriage be set once and for ever—or, whether, and when, and how it be soluble—the jurist can but regard such and analogous alternatives as accidental results, as dependent upon national will,

juridically important rather as facts, than as they may involve moral (still less juridical) truth or error. The attention of the student is recommended to the comments and reasoning of Bentham, in the Section on 'Divorce' of his *Theory of Legislation*, published by M. Dumont (Hildreth's translation). Compare the musulman laws of divorce, quoted in the text (pa. 111.), with the Mosaic, in the 24th chapter of Deuteronomy.

Another, and certainly no minor consideration is, the disability to contract marriage arising from near consanguinity or of collateral family connection. Apart from any dogmatic view of the degree of nearness (which scarcely furnishes a principle), this is clearly a question of civilisation, *viz.* of physiology, of health, of manners, of domestic or social propriety and good taste; moreover, as to all but the simplest and nearest blood relationship, it must be always matter of express and exceptional prohibition. More artificial bars to *connubium* (the Roman term for, capacity to marry) may exist, as, difference of race, of religion, of rank.

Other considerations there are; such as the seat or partition of authority in the marriage union; also, the age of competency in either sex; also, the power of parents or superiors either to coerce into marriage or to prohibit any particular marriage, thus making the *consensus* not actual, but vicarious, else treating marriage as a paternal, as a dominical, or as a feudal property, in respect of the personal dependence of either or both of the contractants. It cannot be said, that these considerations necessarily evolve or appertain to any special rules of jural science. They are specific, depending for solution upon the facts and accidents of each people's ethical and intellectual condition; and, when solved, ranging under general rules and conditions of contract.

Cicero's daughter, Tullia, was betrothed by her father before puberty, and at an earlier age than admitted of rational consent. And we know, that the peoples of Asia view the finding a husband for a female child as essentially a matter of paternal care and choice. That legislation is surely most to be commended, which limits coercive action to the negative prerogative of a *veto*, whilst the child is (even when marriageable) not *sui juris*, and which leaves the moral force of parental influence and filial affection to their natural course. Such rule is implied (even for a mature widow) in the remonstrance of Penelope's suitors:

> "Send to her sire thy mother, to be assign'd
> "To whom *in his eyes and hers* shall favour find."

(h) It is not (as perhaps may seem) here intended to ignore the immoral and cruel despotism sometimes permitted to the head of a family; for indeed this historical truth supports the view in the text: the Roman *patria potestas*, in its most severe stage, was but an erroneous construction of the natural *imperium* or prerogative of paternity. So, every form of supremacy over the woman is justified by the religious and moral view of her conjugal position taken by any particular people or legislator.

(i) Lord Stair, expounding Scottish Law, thus classes "the "rights arising from marriage" *viz.* "1. the *jus mariti*, or conjugal "power of the husband over the wife, her person and goods, and "therewith by consequence the obligement [responsibility] for her "debts; 2. his power, and the wife's security, whereby during the "marriage she cannot oblige herself; 3. the husband's obligement "to entertain the wife, and provide for her after his death; 4. her "interest in his goods and moveable estate at the dissolution of "the marriage."

(j) The accidents of varying superstitions, dogmas of priestcraft, diseased fancies of the demoralised or ascetic brain, have often (and with but too much success) caused promulgation of views degrading half of our noble race to mere servitude, or, at best, mere instrumentality; thus ignoring the internal testimony, which each healthy-minded man has in himself, that woman is his helpmate —that, without his helpmate, he is morally crippled. Surely, review of nations and their history warrants our measuring the Reason, the refinement, the taste, the mental elevation of a people by their backward or ready recognition of this truth, of this feeling! Much more readily will it be admitted, that experience of individuals attests the elevation of character consequent upon a just appreciation of the marriage union, upon the subjection of physical to moral ends in the intercourse of man with woman. Well then, nor too emphatically concludes Dr. Whewell (*Elements of Morality*),— "there can be no peace, comfort, tranquillity, or order in a state "of society in which there are not permanent conjugal unions." Jural glossators, as well of the Roman Civil Law as of modern European Law, describe marriage,—'the lawful communion of a man and a woman, who unite themselves, by indissoluble bond, in order to perpetuate their species, for mutual aid in the task and burdens of life, and to share their lot in common.' This, if it be in some degree utopian, as an exclusive practical rule, is at least true and noble in conception, and (what is more to the purpose) it is by

no means rarely exemplified, as all may testify—in spite of the universal obstacles, in our moral constitution, to permanent concert of minds and wills, in spite also of the inevitably large majority of ill-assorted conjugal unions.

(*k*) *Hedaya.*

(*l*) The first five quotations from Manu (ch. 5, 3, 9); the sixth from Devala.

(*m*) Mr. Spence narrates, that among the Visigoths,—"the mar-"riage state was considered most sacred; the intruder on its rights, "the offending wife and accomplices, might be put to death by "the husband in the heat of his rage, with impunity, or "they might be claimed by him as slaves; nor was the enticement "of the wife any excuse for the adulterer. The Lombards even "permitted a slave to take immediate vengeance on a freeman. "The female who was willingly a party to the infidelity of a "husband was delivered as a slave to the wife, and the suspicion "of this detested crime authorised the liberal application of "torture to the slaves who were supposed to have any knowledge "of its commission." *(An inquiry into the origin of the laws and political institutions of modern Europe)* See also Tacitus *de moribus Germanorum*, sec. XVIII. &c. In the Nepalese remedial system, among *Parbutteahs*, "If a female of the soldier tribes be seduced, "the husband, with his own hand, kills the seducer, and cuts "off the nose of the female, and expels her from his house." The other inhabitants of Nepal "must seek redress from the Courts of "justice; which, guiding themselves by the custom of these tribes "prior to the conquest, award to the injured husband a small "pecuniary compensation, which the injurer is compelled to pay."

(*Journal R. As. Soc.* vol. I. Art IV.)

"If" explains Broom, in his English Law Commentaries, "the wife "be assaulted, maliciously prosecuted, illegally imprisoned, or "otherwise personally injured by a third party, our law in general "gives an appropriate remedy to recover damages in the names of "the husband and wife jointly; whereas, if the beating be so "great or the injury sustained by the wife be such that the hus-"band can allege and prove that thereby *consortium amisit* [he has "lost the conjugal society], he will be entitled to a separate remedy "against the wrong-doer in his own name."

The ecclesiastical remedy by suit for 'restitution of conjugal rights' is, in substance, a judicial enforcement of the *quasi*-real right described in the text.

(n) The mild tenets of Christianity fully enforce marital superiority, which is thus inculcated by the missionary Paul,—"wives, "submit yourselves unto your own husbands, as unto the Lord! "For the husband is the head of the wife, even as Christ is the "head of the church:—Therefore, as the church is subject unto "Christ, so let the wives be to their own husbands in every thing. "Husbands, love your wives—let every one of you in particular "so love his wife even as himself; and the wife, see, that she "reverence her husband!"

(o) The feudal indulgence of dower, '*ad sustentationem uxoris et educationem liberorum*' (for maintenance of the wife and education of the children)—the wife's 'equity to a settlement' (this being the price of a discretionary remedy), can, neither, be said to infringe the Common-law status of the wife. (The Right of dower may now be barred upon any acquisition of the husband.) The policy of English Equity is in aid and protection of the wife against an unreasonable exercise of marital power. But—"So com- "pletely is a *feme-covert* disabled from holding or recovering pro- "perty during coverture in her own right, that if a woman who pos- "sesses personal property, marries and settles it upon herself with- "out the intervention of a trustee, the husband is, *in law*, the "absolute owner of the property. So, the property in wearing "apparel, bought by the wife for herself whilst living with her "husband, out of money settled to her separate use before mar- "riage, and paid to her by the trustees of her settlement, vests "by law in the husband and is liable to be taken in execution "for his debts. And the savings of the wife, whilst separated by "agreement from her husband, out of a weekly sum allowed by "him for her support, may, after her death, be recovered, in an "action for money lent, at his suit, from one to whom, shortly "before her death, they had been disposed of by the wife by way "of gift." BROOM.

(p) YAJNAVALKYA.

(q) In the French Code, enjoyment and participation of rights of property consequent on marriage, vary, within a specified range, as the intending spouses pre-determine. If the 'regime of community' be preferred, no superiority or advantage, even in joint acquisitions, is incident to the marriage union, *i. e.* in respect of ownership, for the male partner has, as a rule, entire management and control of the common wealth (*"le mari administre seul les biens de la "communauté—sans le concours de la femme."*) Certain restrictions

are placed on his power of disposition. The widow, or, if the wife predécease her husband, her legal representatives, may or not elect to share the common property with its burdens.

This conjugal community or sharing may be modified in various ways, never however derogating from the marital prerogative, nor from the surviving wife's maternal tutelage. The French 'dotal regime' is borrowed from Rome. *Dos* (dower) is the woman's contribution, on marriage, to the *ménage*. The marital stewardship of this, is very qualified, and his interest is but usufructuary. He is accountable for the *dos* as well as for all other property of his wife whatsoever (embraced by the term *paraphernaux*) that may come to his hands.

(r) I extract from the old Scottish Book of laws *(Regiam Majestatem)* a portion of a curiously quaint exposition of dowries:—

"This Latin word *Dos*, hes twa significations; for it commonlie is called "and signifies that, quhilk ane frieman gives to his spouse at the kirk-doore "the time of the mariage. 2. Be the canon law, and civill law, all men "are oblissed to indow and give ane dowrie to his wife, the time of the mar- "iage. 3 Quhen ane man indows his wife, either he names the dowrie, or he "names it nocht. 4. Gif he names it nocht; the third part of all his tenement "and heritage perteining to him the time of the mariage, is understand to perteine "to his wife as dowrie. 5. The reasonabill dowrie of ilk wife, is called tierce, "or third part of the tenement perteining to her husband the time of the "mariage; quherein he is vest and saised, as of fie and heritage. 6. Gif the "husband names expreslie the dowrie, to be mair nor the third part of his "heritage; the dowrie may nocht consist, nor stand in sa great ane quantitie, bot "it sall be measured conforme to the third part, or les nor the third part. 7. "Because ane man may give to his wife les then the third parte of his heritage; "bot he may nocht give mair then the third, in name of dowrie. 8. It happins "sometime, that ane man quha maries ane wife, hes littel heritage the time of "the mariage, and thereafter is willing to augment the dowrie with lands con- "quessed be him, conforme to ane third or les. 9. Bot gif na mention was made "of conqueis the time quhen the dowrie was named, albeit the husband hes "littel heritage, and hes conquessed thereafter many lands, the wife may clame "na mair nor the third of the tenement quhilk perteined to her husband the "time of the mariage; because she was first content therewith. 10. The samine "is to be said, quhen ane man haveand na heritage, indowes his wife in silver, "or other moveabill gudes, and thereafter he purchesses meikill land, or heritage; "the wife may clame na parte of the saids lands as dowrie. 11. Because it "is generallie trew, that how meikill it is that is named to ane woman for hir "dowrie at the kirk-doore, and she be satisfied and stand content therewith; her "dowrie may never be augmented thereafter, nor she may ever crave nor aske "any greater dowrie. 12. It is to be understood, that the wife may make na disposi-

"tion anent her dowrie in the lifetime of her husband. 13. Because be the "law, the woman is subject to the power and will of her husband, her dowrie, "and all her gudes quhilks may perteine to her. 14. And therefore, ane man "haveand ane wife, in his awin lifetime, may give, sell, or analie, in anie maner "as he pleases, his wife's dowrie. 15. And his wife is oblissed in this case, as "in all other things quhilks are nocht against God, pleasantlie to obey him. 16. "Moreover, the wife is bound to giue hir consent, and obey her husband, swa "that gif he selles hir dowrie, and she consent thereto, after his deceis she may "nocht repete the samine fra the buyer; gif she confes in judgement, or makes "faith, or is convict that the samine was sauld be her husband, she makand na "contradiction thereto. 17. After the deceis of the husband, the dowrie of his wife "named be him, is vaicand, or nocht vaicand. 18 Gif it is vaicand, the wife may "take possession thereof, and reteine her possession, with consent of the heire "of the defunct husband. 19. Gif it is nocht vaicand, either ane part thereof "is vaicand, and ane other parte thereof is nocht vaicand. 20. Gif ane parte "is vaicand, the wife may take possession thereof in maner foresaid: and con- "cerning the rest, quhilk is not vaicand, she sall raise a brieve of richt direct "to hir warant to doe her richt, anent that towne, or plough of land, quhilk "she clames to perteine to her, as her reasonabill dowrie."—"This Latin word, *Dos*, "hes ane secund signification, conforme to the civill law of the Romans: And "is called that quhilk is given be the woman's friends with her, to the hus- "band, and commonlie is called *maritagium (or tocher)*."

(s) Thus, although when, in ancient Rome, the wife was allowed exemption from the *quasi*-dominical control (the *manus*) which absorbed her civil existence, there was no enacted prohibition to her transferring, in an impulsive hour, all she had to her partner, yet, wrote Ulpian—'It is a received observance (*moribus receptum*) with us, that gifts between husband and wife have no validity.' Certain exceptions were allowed, which, from their character, were free from objection, as gift of a place of burial, of a slave in order to manumission, &c. So, English Law has always protected the woman, during coverture, against alienations of unsettled realty under marital influence, and gives every encouragement to trusts having for object protection of her separate estate against wasteful generosity.

(t) "All children and grand-children who are disobedient to the "instructions and commands of their fathers, mothers, paternal "grand-fathers and grand-mothers, or who do not adequately pro- "vide for their support and sustenance, shall be punishable with "100 blows. This law shall nevertheless only be understood to "apply to cases of wilful disobedience of lawful instructions and "commands, and to cases of wilful neglect of maintenance, on the "part of such children and grand-children as have the means there- "of." *Ta Tsing Leu Lee* (Staunton).

"The vital and universally operating principle of the Chinese "government" (writes Sir Geo. Staunton) "is, the duty of submis- "sion to parental authority, whether vested in the parents them- "selves, or in their representatives; and which, although usually "described under the pleasing appellation of filial piety, is much more "properly to be considered as a general rule of action, than as the "expression of any particular sentiment of affection. It may easily "be traced even in the earliest of their records: it is inculcated "with the greatest force in the writings of the first of their philo- "sophers and legislators; it has survived each successive dynasty, "and all the various changes and revolutions which the State has "undergone: and it continues to this day powerfully enforced, both "by positive laws and by public opinion."

(u) Manu tells the *brahmachárí* or young brahman—"a natural "father is the image of BRAHMA"—"that pain and care, which a "mother and father undergo in producing and rearing children, "cannot be compensated in an hundred years. Let every man "constantly do what may please his parents, and on all occasions "what may please his spiritual guide.—Due reverence to those "three is considered as the highest devotion." "As long as those "three live, so long he must perform no other duty for his own sake; "but, delighting in what may conciliate their affections and gratify "their wishes, he must from day to day assiduously wait on them." "—every other act is a subordinate duty."

(v) Ortolan apparently admits of no distinction between the original Roman *potestas* and *dominium*: but he points out how natural affection and national manners had, before any enactments, softened and qualified the domestic tyranny. The imperial Constitutions in the eighth book of the Code (Tit. 47), which are declaratory, long preceded the legislation of Constantine defining the father's crime who killed a son; and they treat the *jus patriæ potestatis* very much as it is to be found in the French Code.

With regard to the option of abandonment, it would seem that, invaluable as the *aurasa* son is to a Hindu, there yet are conditions under which one may be lawfully abandoned: see Colebrooke's annotation *Mitakshara* § 20; also Vas'isht'ha quoted in the *Dattaka Mimansa* (Sutherland) IV. § 14.

(w) Man is but the instrumental cause of his child's existence—he exerts a power which he can neither explain, account for, limit, or regulate. The helplessness of the human infant, the natural *storgee* or parental instinct, and the character of aid needed—to

say nothing of the normal example of those beings whom we designate, the irrational creation—are circumstances, which leave but a narrow field for discussion or speculation upon the relation and duties of parentage. They indeed dictate the moral sense and reasonable theory—Nature's code—of parental conduct. Domat eloquently wrote: "The bond of marriage which unites the two "sexes, is followed by that of birth, which binds to the husband "and to the wife, the children who are born of their marriage. "To form this bond it is, God wills, that man shall receive life "from parents, in the lap of a mother, that his birth shall be "the fruit of that mother's suffering and labour, that he shall long "be in a state of weakness, such as needs the fostering aid of "parents, for his subsistence and bringing up. And, as God has made "that birth an instrument to kindle the mutual affection which "so closely unites *him* who begets and gives life to the similitude "of himself, with *him* who receives that life, it gives to parental "love a character graduated to the condition of the children, in "their birth, and in regard to all wants which are the fruits of "that life the parents have conferred, in order to incline them, "through that affection, to the duties of education, teaching, &c. "It gives also to the affection of children a character graduated "to the duties of subjection, of obedience, of gratitude, &c., in "which the boon of life involves them—a boon they in so far "hold from the parents, of whom God has willed they should be "born, as that it is certain, without the parents they should not "have had it—which binds the children to give parents all aid "and service in their needs, and above all in those needs attend- "ing the decline of life, and in regard to those weaknesses, infirmi- "ties, and necessities wherein children are able to render to parents "such offices as answer to the early benefits of which they were "recipients. It is in this order of things, from the birth of "children, giving rise to ties between them and the parents, that "lies the foundation of all their duties—duties, whose scope is easily "traceable in their various obligations. Moreover, upon the above "principles depends whatever civil laws may have laid down as to "what comes from the father's power, and as to the reciprocal "obligations of parents and children; accordingly, these are munici- "pal matters, as are in like manner the rights which laws and "customs confer on fathers for the ruling of their children, for "celebration of their children's marriages, for administering and en- "joying their children's possessions, in respect of the revolt of

"children against what is due to parents, also injurious conduct of "parents or of children in refusing sustenance, and the like."

A jural division of the period of filial relation into three portions, as we find in Grotius, is superfluous, perhaps fanciful. The helplessness of childhood scarcely needs argument or illustration to prove the necessity of dependence and obedience on one side or of parental guardianship and control on the other. The second stage—as it were, the twilight before the full dawn of early manhood—is and must be one governed by purely civil and artificial rules of the parental function and its continuance, as a safeguard, though not indispensable. In the third stage, *viz.* of complete adult years, Reason suggests emancipation from the civil bond of filial subjection, leaving entire, the piety and gratitude of Nature's code.

(x) Deuteronomy, ch. xxi.

Referring to the subject condition of the most favored of sons, the Christian apostle (a Jew) wrote: "—the heir as long as he is "a child, differeth nothing from a servant, though he be lord of "all; but is under tutors and governors, until the time appointed "of the father."

Whether the accident of pre-existence, of itself, entitles to pre-eminence, to superior place and respect, to power or influence, irrespective of capability or intrinsic qualities such as, superior knowledge, superior moral influence or mental endowment, or title to gratitude for benefits conferred—is a question somewhat analogous, in character and significance, to one suggested by overweening assumption on the part of those of our fellow men whose claims to power, rank, or dignity are but civil accidents, *e. g.* hereditary or sprung from the caprice of kings, &c. Worth is not necessarily nor invariably denoted by length of life or hoary experience; yet, Age is Nature's rank, aged men *should* have earned respect during their passage through the trials of life. It is no futile nor arbitrary presumption, then, that the fathers of mankind may claim honor and reverence from their juniors and successors. "Thou shalt rise up before the hoary head, and "honour the face of the old man—" (*Leviticus.*)

Moreover, the sentiment is as universal as it is spontaneous.

(y) An able German publicist and Prussian statesman (W. Humboldt) deprecates and argues against all direct State interference, further than to appoint guardians where parents are remiss, and extend assistance when they are indigent. His argument

seemingly tends to prove, that children should not be brought up in groups or masses—that education should be individualised, have reference solely to the development of each child or each family and the circumstances surrounding each. See an interesting account of national provisions for education in the American States, and generally, by Kent, *Lec.* xxix. Shrewdly reflected Mr. Laing, when noting the prevalence of good manners among the French people—"It is but reading, writing, reckoning, and the catechism, "after all, that can be taught a people by the most perfect system "of national school education; and those acquirements would be "dearly bought if they interfere with, or supersede family instruc- "tion and parental example, and admonition in the right and wrong, "in conduct, morals, and manners." (*Notes of a traveller &c.*)

(*z*) So by the *Sheraa*, if a widow have not contracted marriage with another than one nearly related to her first husband, she retains charge of his son, but only till the boy has attained seven years: at that age she must give him up to his appointed or his legal guardian, for education. A daughter is left with her mother until puberty. (See Macnaghten.)

(*aa*) Bell's Principles.

(*bb*) See Sir Edw. Coke's Commentary on the Statute of Merton.

(*cc*) The Mosaic law is:

"A bastard shall not enter into the congregation of the Lord; "even to their tenth generation shall they not enter into the "congregation of the Lord." (*Deut.* xxiii, 2.)

One according to the dogmas of Hinduism misbegotten, *i. e.* whose conception was a crime in the parents, is thus described; MANU—"A son begotten through lust on a *Súdrá* by a man of "the priestly class, is even as a corpse though alive, and is thence "called in law a living corpse."

(*dd*) "The word *pindá*" writes Sutherland (*Dattaka Mímánsá*, vi, 10, no.) "signifies either, 'the body', or a 'cake' or 'ball' of food "presented to the *manes* of the deceased: the word *sapindá* there- "fore, may denote either one consanguineally related, or one connected "through an oblation of such funeral cake." In Bengal, however, the latter is invariably the signification; the double meaning is found in the *Mitakshara*.

(*ee*) 'was.' These modes of filiation are but antiquarian theories or traditional, being now forbidden as unfit for the present degenerate condition of mankind (*Dattaka Mimansa*, i, 64, &c.: see also 'General note' Haughton's edition of Sir William Jones' Manu);

but they illustrate Hindu idiosyncrasies of sonship. The raising up lineage by one of kin to the deceased husband was ordained by the Jewish Law (*Deut.* xxv, 5), and is exemplified in the tale of Boaz' marriage, as told in the book of *Ruth*.

It is the opinion of Biblical scholars, that adoption by the childless was a Jewish practice; *i. e.* taking a stranger into a family, in order to make him a part of it, acknowledging him as son and heir to the estate. (See Horne's *Compendious Introduction &c.*) With respect to the Arabs and to the Mahommedans, see Sale's Koran, ch. xxxiii. no. f.

(*ff*) The *Mitakshara* ch. II, s. 10, § 11, as translated by the learned Colebrooke, seemingly denies to the impotent the privilege or right of adopting: but I am well advised that the doctrine is unquestioned in practice, and that the received translation of the particular passage is rather an adaptation of the text. I annex an extract of a communication from the profound and trustworthy Eshwur Chundra Vidyasagara of Calcutta, *viz.* after acknowledging the general correctness of Colebrooke:

"I should think the following to be the correct rendering of "the passage: 'The specific mention of 'legitimate issue' and "'offspring of the wife' is intended for the exclusion of other "sons'—that is, if the disqualified persons have sons other than "the *aurasa* and *kshetraja*, they will not be entitled to inherit "or share the ancestral property; for, in the case of impotents, &c. "two kinds of sons alone are specified as entitled to allotments."

The learned pundit has also verbally explained to me, that the notion of inconsistency in adoption by an impotent is inapplicable to Hindus, inasmuch as this and all congenital defects are, with them, retribution for sins in a previous stage of existence, and in no wise forestal or remove the obligation of—male lineage ritually perfect. But the impotent's *dattaka* son is, like the father, entitled to maintenance only.

(*gg*) WILHELM VON HUMBOLDT (Coulthard).

(*hh*) HERMANN, *A Manual &c.* (Street).

(*ii*) M. Porcius Cato, addressing the Senate against repeal of the Oppian sumptuary law, said:

"Our ancestors willed that women should not act even in private "affairs but under guidance, that they should be under the *manus* "of parents, of brothers, of husbands. We, as it seems, suffer these "same women to meddle in public affairs, to be amongst us in the "*forum*, in public assemblies, in the *comitia*!" and, "Never with

"safety to our households may female dependence be done away "with!" (Livii *Hist.* XXXIV, 2.)

The grounds of this distrust (*viz. levitas animi* and *sexûs infirmitas*) show a similarity of opinion in this matter between the Hindu *Rishis* and the early *Patres* of Rome.

(kk) "To females possessed of moral rectitude and mental ca- "pacity, we grant, on completing 18 years, the capacity of adult "age—so that they may enjoy, in all matters, precisely the same "rights as males; provided, that they may not (unless permission "be decreed) aliene landed estate." *Co.* II, 45, 2, § 1,)

(ll) A musulman can appoint a testamentary guardian. Matrimony and property are the two several purposes of guardianship: for the first, the legal right, in absence of nomination, is with the nearest paternal kindred; so, charge of the minor's property is with the father's *wusee* or with the paternal grandfather or his *wusee*, or with the magistrate, *viz.* the State nominee. (Macnaghten).

(mm) The old feudal wardship is not referred to; as it was a merely arbitrary amd artificial institution. As observed by Chief Baron Gilbert (*Common Pleas*) "—wardship in the feudal law was of "another nature, for the guardian had the whole profits in the estate, "and also the marriage of the infant, which was in order to bring "him up to arms, and to marry such person, as they thought "might continue the martial strain, that so the ward might subserve "the original design of the tenure."

(nn) It follows an injunction to deal righteously with women, in regard to marriage and dowry, and precedes one for treatment of orphans quoted *supra* pa. 133.

SECTION VII.

HEIRSHIP, SUCCESSION; TESTAMENTS—*i. e.* JURAL DEVOLUTION OF RIGHTS AND JURAL REPRESENTATION, UPON DEATH: ORIGIN, NECESSITY, AND PROGRESS THEREOF, NATURAL AND CIVIL.

Each man having but a limited period (—the maximum is within easy calculation—) wherein all his bodily faculties and means of enjoying the things of Earth must be exhausted; it may seem idle to give him or suppose him to possess, never-ending relations with those things. It is, in truth, a supposition, a fiction, meaning something else than the words in which the idea is usually cloth-ed may intrinsically convey.

The hereditary or substitutive element in that idea is a natural, a necessary incident or accessory of property, *i. e.* of complete appropriation; it is not merely civil or artificial: the power to transfer and aliene included in that idea, is but a develop-ment of the power to use and enjoy; 'disposition' being, as before explained, a mode of enjoyment, and has even been treated as a mode of putting to use.

"The uses of every possession," wrote Aristotle, "are two, both indeed essential, but not in the "same manner; for the one is strictly proper to the "thing, the other not; as a shoe, for instance, may "be either worn or exchanged for something else; "for both these are uses of the shoe; for he who "exchanges a shoe with some man who wants one, "for money, or provisions, uses the shoe as a shoe, "but not according to its proper use; for shoes

"are not made to be exchanged." And the illustration applies to every kind and form of disposal, as an exercise of dominion, whether qualified, contingent, gratuitous or otherwise. Still, a use which places the thing used, without at all consuming it, out of the owner's reach or further dealing with, even partially, is not properly so called; the term (or its equivalent) is metaphorically applied: for, it is the Right of property itself, *jus abutendi*—to make away with—the distinctive test of proprietary dominion, that is exercised or used, not the thing, the subject of the Right.

Succession to rights and property upon death, *i. e.* heirship, simply, is, substituted ownership—a substitution essentially distinct from 'alienation' or change in ownership; inasmuch as heirship is to fill up a vacancy, to supply *an* ownership: it imports (intrinsically and in the abstract) a necessary continuation of some personal Right of property, which, but for the scheme of heirship, would fail and lapse, leaving the subject of property, to the extent of the deceased owner's Right therein, derelict. This primary idea and basis of heirship is well illustrated by the familiar maxim in physics, that, Nature abhors a vacuum. In like manner, Law or civil order abhors *i. e.* does not admit of unowned *res* or subjects of property—in other words, does not admit the notion or possibility of 'things' having no relation with 'persons'—within the territorial limit of the State: ownership must be somewhere.

Here then we have the civil origin of heirship, as a general, indefinite necessity. The early development of the idea proceeds uniformly and naturally: as thus—the head of a family (the proprietor) dies—where else can we look for a substituted, a continuing owner, than among the family-group? whether it be, the elder member, or the aggregate of members, either males only, or otherwise. Some uniform contrivance of domestic stewardship or apportionment inevitably offers itself or is adopted. Further, and by an equally natural deduction, it may be said: the dependents upon the deceased citizen's bounty or labour have to be provided for. The relation of those dependents to—their claim upon the left estate of—their late supporter, their head, their cause (if a direct ancestor), could not but be acknowledged by the rudest healthy mind; because *felt* by every father, by every man not alienated from his kind. It is an inevitable adoption of the Law and suggestions of Nature, and is in close civil relationship with family-rights.[a]

MANU—"After the death of the father and the "mother, the brothers being assembled, may divide "among themselves the paternal estate—the eldest "brother may take entire possession of the patri-"mony; and the others may live under him, as "under their father—To the daughters let their "brothers give portions out of their own allotments "respectively—"

Al Korân—"Men ought to have a part of what

"parents and kindred leave—whether it be little "or whether it be much—And when they who are "of kin are present at the division, and also the "orphans, and the poor; distribute thereof unto "them. A male shall have as much as the share "of two females—Moreover ye may claim half of "what your wives shall leave, if they have no issue; "but if they have issue, then ye shall have the "fourth part—They also shall have the fourth part "of what ye shall leave, in case ye have no issue; "but if ye have issue, then they shall have the "eighth part—"

"YAJNAVALKYA—"The heirs of a hermit, of a re- "ligious ascetic, of a professed *brahmachâri*, are "successively, the preceptor, the disciple, and an "associate dwelling in the same religious retreat."(8)

Genesis—"And Abram said, Lord God! what wilt "thou give me, seeing I go childless, and the steward "of my house is this Eliezer of Damascus?— "Behold! to me thou hast given no seed: and "lo! one born in my house [Eliezer] is mine heir."

Such is the recognised claim of the 'family,' whether natural *i. e.* of blood, merely social and civil, or even what may be deemed accidental—of the home-group, its branches and dependents.

Thus we have reached an important jural principle and landmark, *viz.* that the family, as a rule, represent a departed owner. But, the details, the apportioning of that representation, of its benefits and burdens, scarcely admit of adjustment by any general formula, nor of reduction to any fixed

standard as a jural principle. Certainly, direct descendants—offspring—have an obvious and (it may well be contended) a paramount claim. This is quaintly indicated in the Roman phrase *sui hæredes*, which may be rendered 'heirs of their own'; it marks an inevitable, inherent interest peculiar to one class of heirs, differing in kind —standing out in relief—from every other claim of succession, one born with the heir, and not an accident or a contingency in the sense that a remote or a collateral heirship is. Yet, that distinction and preference, if even itself definite or well-marked, leads but a short way in designating heirs or classes of heirs. Moreover, within the pale of the peculiar class are doubts and divisions. When, in the order of descent or representation, no *sui hæredes*, no inner and immediate circle of the family are present, where or how a successor is to be ascertained or sought, is not discoverable by the light of any jural dogma or of any general principle, but is a question whereof a solution must be sought—the answer and the fact is in each case a result to be found —in national idiosyncrasy, in the accidents of history (*i. e.* the influence and consequences of such accidents), in what may be termed the special proprietary policy current through any particular legal system. In the same wide field must a clue be sought to the selection or apportionment among immediate descendants that may obtain with any people, *i. e.* whether primogeniture, aggregate succes-

sion, exclusion or inferiority on account of sex or of any infirmity; also secondary representation, whether *per stirpes* or *per capita;* &c.—in each case, it is a special and particular, whether or no a purely civil, result.

These propositions are readily illustrated and confirmed by reference to the several sets of canons of inheritance, with their explanation and reasons, in several national codes or systems: the canons and their explanatory bases severally vary, internationally, precisely with the dogmas and moral accidents which in each case govern the national mind, and, therefore, the national legislation—more or less obvious and consistent, more or less in accordance with *a priori* conclusions of what is right and fitting, always a calculable result of manners and historical accident, as are all civil methods and rules.

GAUTAMA[c]—"Let kinsmen allied by the oblation "to ancestors, by family name, and by descent "from the same patriarch, share the heritage—" Such are the *sa-pinda* (same food-oblation) and *saman-odaca* (*samana* same, *udaka* water-oblation), the *sa-culya* (*kula* family or tribe, *ya* born of), and the *sa-gotra* (*gotra* race-founder or patriarch) of the Hindus.

YAJNAVALKYA—"An impotent, an outcast as well "as his son, a cripple, a madman, an idiot, one "blind, one miserably diseased, and such like, are "to be maintained, but do not share in the "inheritance." "The *stridhana* of a wife dying

"without issue, who has been married in one of "the four forms of marriage called *brahma*, &c. "belongs to the husband;—should she have been "married in another form, then her *stridhana* goes "to her parents."

"It was," writes Hermann, "a fundamental prin- "ciple in Athenian Law, respecting the succession "to persons dying intestate, that male descendants, "or male relatives, always excluded the claims of "females, who otherwise in point of relationship, "had an equal or even a nearer right; and this "was the case with descendants either in a direct "or only collateral line, except that the right of "collateral descendants ended with second cousins."

After the strict civil heirship of agnates (—of which the test was, being traceable to one identical *patria potestas*—) in the *Jus Civile*, came *gentiles*. These are described by Cicero: "*Gentiles* "are, 'they who have a common name': but not "this only; 'they who have sprung from *ingenui*'[d]: "nor does that suffice; 'none of whose ancestors "have been servile':[d] one incident yet remains; "'who are under no diminution of *caput*'—"

"By the Roman Law, as it was finally settled "by the Novels, on the decease of an intestate, "the descendants, of whatever degree, were called "to the succession, in exclusion of all other re- "lations whether ascendants or collaterals, and "without regard to primogeniture, or preference "to sex. Where the intestate left no descendants, "such ascendants as were nearest in degree, male

"or female, paternal or maternal, succeeded to his "estate, in exclusion of the remote heirs, and "without any regard to representation; but with "this exception, that, where the deceased left bro- "thers and sisters of the whole blood, besides "ascendants, all succeeded in equal portions *in* "*capita*; and here, if, besides ascendants, the de- "ceased left brothers' and sisters' children of the "whole blood, the children succeeded to their pa- "rent's share, by representation, *in stirpes*." And with that system is contrasted the very different scheme of feudal successions, *viz.*

"Originally fiefs were granted to be held at the "will of the donor, and were, therefore, resumable "at his pleasure; then, they were granted for a "year certain; then, for the life of the grantee; "then, to such of the sons of the grantee, as the "donor should appoint, then, all the sons, and in "default of sons, the grandsons were called to the "succession of the fief: in the process of time, it "was opened to the 4th, 5th, 6th, and 7th genera- "tions, and afterwards, to all the male descendants, "claiming through males, of the first grantee; "and at last, was suffered to diverge generally to "collaterals. But this, as to such collaterals as "were not lineal heirs of the first donee, was "effected through the medium of a fiction com- "pletely and peculiarly feudal. When a person "took by descent, his brothers, though in the "collateral line of relationship to him, were in "the direct course of lineal descent from the ances-

"tor. In proportion as the descent from the "ancestor was removed, the number of persons "thus claiming collaterally from the last, and "lineally from the first taker, was proportionally "multiplied. In the course of time, the first taking "ancestor was forgot, and then, it was presumed, "that, all who could claim collaterally from the "person last in the seisin of the fee, were of the "blood of the original donee."(e)

Civil Law invariably (because of necessity) provides for the vacancy caused by death of a citizen, not merely in respect of his property-rights, but in all his jural relations—that is, so far as the necessity or significance of any relation survives the individual actor. The removal by death of a father or husband may not call for substitution in relation to children or wife who are *sui juris;* but, if the dead citizen were a magistrate, a land-holder, a military commander, a guardian of minors, his place, in all or any of those characters, has to be supplied—here, the functions are the essential, the individual an accident.

In respect to vacant ownership, it is provided for in entirety; whether it devolve in the mass *(per universitatem),* as it did upon the Roman *hæres;* or in fractional proportions, as among Mahomedan sharers and residuaries; or, as to one description, in the mass, and as to another in fractional shares, as in the English 'real' and 'personal' successions.(f)

To be an heir, *i. e.* to be entitled to take and own the property of another when this other shall die, is a conditional Right. Heirship designates a status relation, that is, of family, and is a civil incident of such status. All succession to, or substitutive personation of the dead, other than what may result from family ties or from the disposing power of the late holder, is merely official or political: it is 'succession,' not 'heirship.' For instance, Law may provide for devolution of a crown, and of a dignity, for the permanence of a body-politic (as a college, a board of officials, a council of ministers), for the command of a regiment or of a ship—*i. e.* it may be part of the constitution and of the essence of those several functions and positions, that the contingency of an individual's death effects a specific change in the non-essential quality or accident of a particular individual or individuals being clothed with some duty or some privilege. This sort of functional and arbitrary replacing, obviously differs from descent or heirship of private rights and property, whether by Law, *i. e.* according to a general rule of Law, or, as in each instance planned by the late owner.

The only case in which the meaning and character of heirship could be merged in or confused with official succession, is, where family claims are displaced by universal communism, and where private property therefore, even when transferable *inter vivos*, is but a usufructuary Right, passing, upon

death, to a State-nominee, unfettered by any natural obligations, any ties, or wishes of the departed holder. (g)

The power of posthumous alienation—exercised either, by designing a plan of succession to one's self, or, by abstracting something from the property to devolve upon a Law-named successor, for bounty or disposal not contemplated in the general provisions of Law—has been wholly or partially admitted, according as each civil system encouraged or interpreted the alienating and disposing attributes of proprietary dominion. An advanced stage of national progress, material and moral, suggests and justifies removal of all restraint, as affecting private interests, (h) *i. e.* an entire commercial license in rational disposition of property and rights, whether during the life of the owner or to take effect on death. This has come to be the case with the English. (i)

By the French code: "Acts of liberality, whether carried out between the living, or by last will, cannot exceed the half of the donor's property, should he leave at his death but one legitimate child; the third, if he leave two children; the quarter, if he have three or more."

Ancestral wealth is held by a Hindu with qualified ownership.

Mitakshara—"—the grandson has a right of prohibition, if his unseparated father is making a donation or a sale of effects inherited from the grandfather—" (j)

The terms 'testament,' 'testamentary,' 'testator,' 'testacy,' 'testate,' 'in-testate,' signifying respectively, the instrument or act, its descriptive quality, the actor, and the condition, in regard to dispositions of property and rights to take effect after death of the disposer, are, like many other terms, in scientific no less than in colloquial language, legacies of Roman jural nomenclature: those terms refer (in the most obvious and reasonable construction of their etymology) to one circumstance and normal requirement of the Roman last will, which has been by no means always adopted in modern systems, *viz. testes*, attestation, witnessing. However arbitrary the use or application of those terms, they have obtained a recognised and well defined meaning in jural science.

Jurists have usually accounted for laws determining in-testate successions or heirship, by treating each method as a substitution for what the deceased would (normally) have devised as a fitting disposition of his proprietary relations and rights. One (nor the sole) objection to this theory, is, that testamentary devolution of property is not, either historically or by rationally conjectural inference, the precursor of Law-dictated devolution: the legal necessity and rule has always, and necessarily, preceded the arbitrary or discretionary power.

In the absence of any one possessing (according to any particular system) the status or claim of 'heirship,' the unowned *res* lapse as ofcourse to the common stock; *i. e.* the State cannot but be heir in the last

resort (*ultimus hæres*). Class privileges, not strictly indicative of substitution or succession, may intervene between the two stages—*viz.* 1. private or family devolution, 2. public or State acquisition—where property has no hereditary owner, in the ordinary sense. The 'lord' of the feudal system, and brahmans (to the wealth of brahmans) among Hindus, severally furnish an instance of such intermediate class *quasi*-heirship.

(a) Two marked exemplifications of the views now offered are, the Roman and the Hindu plans of heirship, or devolution of property on death.

In the former polity, the Law designated the *hæres*, upon whom the *persona* should devolve. A provision of the XII. Tables introduced a practice (or gave it declaratory force as a jural faculty) to burden the *hæres* with dispositions, legacies, as declared by the last will of the defunct citizen. Moreover, ingenious jural devices and legislation protected the natural dependents of a testator from cruel or manifestly unjust disappointment.

Spiritual or dogmatical obligations envelop and hem in the Hindu: they are due to the dead: the Law designates by whom and how they shall be fulfilled; and, associated with the Right and duty to fulfil them, is, the devolution of ownership, burdened with those obligations, also burdened with the care of females and junior members of the family.

In each of those systems, but one definite juridical idea of succession is traceable, *viz.* that the ownership must be provided for, to the dead man's substance: but, the mode, in each, is governed, prescribed, by the paramount maxims, the dominant motives, the current and regulating principles of the particular social scheme: the variations or differences between one code and the other, are special characteristics of each people, not any variation of jural principles.

(b) It appears from Aulus Gellius, that the Roman Vestal could bequeath and could accept bequests, but could neither succeed as heir by Law nor could any (not appointed by the Vestal's testament) claim as legal heir to her: the public or State succeeded on intestacy. (*l.* 1, *c.* xii.)

(*c*) quoted in the *Mitakshara*. And MANU—"Now the relation "of the *sapindas*, or men connected by the oblation cake, ceases "with the seventh person (or in the sixth degree of ascent or "descent), and that of *samánódakas*, or those connected by an "equal oblation of water, ends only when their births and family "names are no longer known." In the *Mitakshara*,—"kinsmen sprung "from a different family, but connected by oblations, are indicated "by the term *bandhu* [connected, bound to]." *e. g.* sons of the deceased's father's sister, &c.

(*d*) "For instance," writes Ortolan, "in determining succession "to a *cliens* or to a freedman without agnates, resort must have "been had to the *gens*, immemorially noble (*ingenua*), to which "he [the *cliens* or the freedman] owed his origin, whose name "and *sacra* his race had adopted: the nearest member of that "*gens* was his heir."

(e) These two extracts, comparing the Roman and feudal plans of succession, are from Butler's Note on Feuds, *Co. Lit.* 191 a. Grotius remarks, that the various laws of succession, where there are no children, may be all traced to two sources, *viz.* nearness in degree of relationship, and reverting of property to the quarter whence it was derived; and, as an instance of the latter rule, that the father's wealth should go to the paternal branch, the mother's to the maternal, *i. e.* on intestacy. He quotes Aristotle; "One "should rather make suitable return to a benefactor, than bestow "favors." also from a funeral oration of Lysias; "Return of favors "received from the dead must be to their children, naturally, who are "parcel of their parents, and whom the parents, if alive, would "most desire to benefit." And with respect to self-acquired wealth, Grotius gives the succession to him whom the deceased must be supposed to have had most regard for, and whom he assumes to be the nearest cognate.

(*f*) The modes and maxims of descent of lands in the English Common Law are of that special character which arose in the mediæval period of European history, as the last phase of the feudal system; primogeniture, early introduced when feudal sovereigns forbade any division or splitting of fiefs; preference of males, because of military services; exclusion of ascendants, as being incompatible with the constitution of the feud. With respect to adoption of any such rules in the inferior or agricultural tenures, Sir Martin Wright (*Law of Tenures*) relates, that it was "in imitation of the "more honorable tenures." Elsewhere we read, "The progress of

"the right of primogeniture in public, corresponds to the same "progress of it in private successions. Thus in the two first races "of the French monarchs, the succession to the kingdom was "divided among all the sons; and in the earlier periods of the "Saxon history, the same division of the kingdom is frequently observed "to take place."—And, as to collateral succession, "—by practice, with-"out a public ordonnance, it crept into the Law of Great Britain, as "well as into that of other European nations, that not only in "*feudis paternis*, but even in fiefs which a man had purchased him-"self, his collaterals *in infinitum*, as well as his descendants *in* "*infinitum* should succeed." (DALRYMPLE, *An essay towards a general history of feudal property &c.*)

(g) For public policy may impose fetters, as in the English restrictions of, 'perpetuity,' 'superstitious uses,' incapacity of aliens; and the Roman prohibition of gifts between man and wife.

(h) This hypothesis supposes all property (not merely fiscal but dominical) to be in the State, either originally, as in the theory of Feuds, or by some accident, as among the Egyptians during the famine narrated *Genesis*, c. XLVII, v. 19 &c. It is related of the Samoans, a Polynesian tribe:

"The titles of the heads of families are not hereditary. The "son may succeed to the title which his father had, but it may "be given to an uncle, or a cousin, and sometimes the son is "passed over, and the title given, by common consent, to a per-"fect stranger, merely for the sake of drawing him in, to increase "the numerical strength of the family.—The land belonging to "each family is well known, and the person who, for the time "being, holds the title of the family head, has the right to "dispose of it. Although the power of selling land, and doing "other things of importance affecting all the members of the fa-"mily, is vested in the titled head of the family, yet the said res-"ponsible party dare not do any thing without formally consulting "all concerned. Were he to persist in attempting to do otherwise, "they would take his title from him, and give it to another. The "members of a family can thus take the title from their head, and "heads of families can unite and take the title from their chief, "and give it to his brother, or uncle, or some other member of the "chief family, who, they think, will act more in accordance with "their wishes." (TURNER, *Nineteen years in Polynesia)*

(i) From *Magna Charta* it is apparent, that English Common Law protected the claim of the widow and children to a 'reasonable

portion' of personalty. And, accordingly, in the Register of old writs are found the king's writs (*i. e.* commands) on behalf of the widow and of the sons and daughters, against the executor of the proprietor's testament. This *was* the custom of the realm of England; one third only could pass under a last will.

In Scotland the '*jus relictæ*,' 'Dead's part,' and 'Legitim,' are (as much else in Scottish jurisprudence) a modernised edition of the great prototype born and matured on The Seven Hills.

Chief Baron Gilbert gives the following reasons why, under the original feudal Law of England, landed estates did not ordinarily pass by last will—"A feud was at first no more than the Right "which the vassal had, to take the profits of his lord's lands, "rendering unto him such feudal duties and services as belong "to military tenure; so that the tenant had only the use of the "land, and the property (*dominium*) still continued in the lord—on "the death of the tenant, the land lay empty and fell into the "lord's hands, and the taking it out of the lord's hands was called "*relevium* [when it devolved upon the natural heir as the lord's "ward, and burdened with the widow's thirds or dower,] which "was in the nature of a new purchase——Besides, this way of "conveyance [by last will] wanted that solemnity, which the feu-"dists thought necessary to establish in transferring lands, that if "at any time a dispute should arise, it might be the easier deter-"mined by the *pares comitatûs* [tenants of the district], who were "witnesses to that notorious and public manner of conveying by "livery—"

(*j*) Latitude of construction among glossators and pundits, and the free commercial tendencies of English Law, have combined to weaken and modify (if not repeal) in Bengal, the doctrine, that, "—ownership "of father and son is co-equal in the acquisitions of the grand-"father—" (YAJNAVALKYA).

SECTION VIII.

TITLE. PRESCRIPTION; RIGHT FROM USE.

'Title' *(titulus)* is a word used by jurists, somewhat ambiguously, as indicating the signs or evidence *(indicia)*, by or through which any of the jural faculties called 'rights' are known to exist, when to be presumed, when proved. A Right may be known and apparent in its exercise, or usually so; *i. e.* the fact that a particular jural power and faculty—one of the jural class, rights, is held by a particular man: but, should it be required to know, to ascertain, whether that man is the legal and the real as well as the *de facto* or the apparent holder of the faculty he is exercising and putting to use, or further, how and when he came by it—then, the one simple apparent fact, of the Right being exercised, does not suffice—inasmuch as, without Right, every faculty of a proprietor may *de facto* be exercised. Again, one without power to enjoy, to use, to dispose of, or deal with, a particular *res* or a particular Right, may yet be owner of, and, in legal theory, even holder of that very *res*, of that very Right. It follows that, the real Right-owner may have to assert and prove his Right against a *pseudo*-holder. So, one who exercises (acting as the legal holder of) a Right, may have to vindicate his conduct, *i. e.* to furnish proof, that the as-

sumed Right belongs to him, and should be legally adjudicated to be his, *de jure* as well as *de facto.*

Full information—other facts—must be sought for, *viz.* such facts, affirmative and negative, as, taken together, warrant and support the inference, that he who exercises the faculty is what he seems and assumes to be, *viz.* jural holder of the Right, or *vice versâ,* that the ousted claimant is entitled to displace the holder and pretender. That information, whether it consist of one or of several facts, if it affirm the Right, is a title. Thus explained, title or manifestation of Right, is a jural edifice, built up, constructed of facts, the absence of any one of which would endanger its stability; each of those facts being weighed and measured and arranged by a legal standard.

A title to property, exhibits, as in a mirror, the continual existence or progress (may-be the occasional suspense, and revival) of an estate or interest, under one or more, various or single, modes and phases of enjoyment, of devolution, either from its first creation as a property or Right, or during such period as the Law (to which it is subject) permits the history of Rights of that class to be inquisitorially sifted and raked up: and a title, if not a complete shield against all opponents or claimants, from whatever quarter, is a contradiction—is at all events not what it should be, and assumes to be—possibly a good imitation, perhaps a shadow, not reality. We hear of, a hold-

ing title, a marketable title, a *primâ facie* title, a safe title, a defeasible title, a weak title—qualifications, imperfectly indicating different stages, efforts, or modes of proof—of vindication and manifestation of Right. It therefore follows, that, 1. a title necessarily includes the mode and cause of the immediate, the present holder of the Right enquired about, becoming such holder, as by sale, gift, succession—this fact is, as it were, the roof and completion of that jural edifice which title should be; and, 2. what is a title, what its ingredients and requirements, depends solely (as we have seen the essentials of a contract do,) upon the special rules and provisions of each law-scheme. For what length of time the history of property and ownership must be traced and verified to constitute a title—what modes of devolution, of alienation, of acquisition, are links of Right and therefore of title—what are impediments, burdens, restrictions, in attainment or enjoyment of rights and how removable—such are enquiries which must be variously answered, according as the Right claimed and of which the title is in question, is under English, or Indian, or French, or other specific municipal system.

"*Tituli*," wrote the jurist Vinnius, "are the "causes from which *res* are severally acquired." And he gives as instances of title; "one has "bought something, or something has been made "a gift or bequeathed to him, who therefore af- "firms that he holds upon such title (*titulus*)."

—elsewhere, "—he who holds against *jus* (*injustè*), "that is, without *titulus*—" and "—that possession which is *injusta*, for want of *titulus*, is to "be accounted honest because of the intent of the "*dominus* who transferred it". And, in defining mere, untechnical, or natural possession, he says, it is, "that possession which one has without "*titulus*, or consciousness of being the *dominus*, "and is therefore put in opposition to civil possession."—And, "—they who are not owners, although they possess as well in a civil sense as "honestly, also under a rightful *titulus*, are yet "not to be described as possessing in full property (*pleno jure possedere*)."

A later modern expositor of the Roman Civil Law (Warnkœnig) thus defines *justus titulus*,—"whenever one has got possession from such *causa* "as would have conferred ownership of the thing, "had not some defect crept in (—wherefore *titulus* "is at this day defined 'a *causa* capable of transferring ownership,' or 'a proceeding translative "of ownership', though defective—), as if you buy, "and take delivery, from one who is not owner, "but whom you thought to be owner."

Now it seems, that in the above extracts, *titulus* or 'title' is used in two senses, *viz.* 1. a lawful mode or cause of acquisition, *e. g.* purchase and sale, gift; 2. the Right, or jural claim to have and hold, in the complete sense above explained as what 'title' strictly is. 'Just cause' is the Roman Civil-Law phrase for the first sense or

idea of 'title:' the second is little else than a paraphrase of Right, or (perhaps more accurately) an authoritative, because a logical, assertion of Right. For, a Right is a result. [a]

We have seen that occupation is the origin of property, *i. e.* of rights in or over or in respect of any material not before appropriated. Such a derivation of jural rights is a necessary theory and postulate whence to deduce and whereon to erect a proprietary system. Now, although in fact, under no scheme of laws can *res* be ownerless, yet, they may be abandoned, they may be unclaimed, they may be usurped, they may be so carelessly owned that a stranger can deal with and use them unmolested and hand them over, as owner, to a purchaser: moreover, the *indicia* of jural ownership (proofs of title) may be lost, and no longer reliably traceable. Such instances simulate the primitive condition of property, that is to say, the taker and effective holder who desires to hold on must be allowed to hold, as owner. It is rational that the nation, the State, should so construe and allow the condition of such *res* to be. Again, where there is usurpation or unauthorised enjoyment of another's property; the proprietor looking on the while, tacitly acquiescing or not adopting any jural mode of remedy or claim —in such case, the omission of the owner to act, is certainly not a *titulus* nor a technical *justa causa* of enjoyment; yet, it is not irrational nor does it

offend the moral sense, that a limit of time should be fixed, beyond which such careless or dogged acquiescence should have a jural meaning and construction put upon it, so as to operate, if not positively and in a general sense as a forfeiture, yet as a transfer to the actual and active holder. And thus it is, the owner of any Right or proprietary interest always suffers, at his peril, his advantage of ownership to be dormant. Law does not favour usurpers, neither does persistence in or repetition of wrong engender civil right: but civil benefits and civil remedies, alike, can be available to those only whose conduct evinces some sense of their existence and of their value. It may well be held, that long pertinacious indifference to the engrossing by strangers of one's possessions and special interests, is a social offence, and properly visited with forfeiture: it is insensibility to the worth, to the very existence of civil order; and a reckless substitution of that primitive state of things when mere occupancy was Right. Such penal result of a proprietor's crass neglect, is shadowed in the law-maxim, 'Laws aid the wary, not the sleeping.' Moreover, such conduct is a premium to disorder, confusion, and spoliation.

Hence it has come about, that "whoso has "within human memory been in continual possession of any thing or continually exercising some "Right, on that very ground is assumed to have "legitimately acquired it.—Proof of a prescription "of this sort is properly had from testimony, *viz.*

"of those who assert that they have always so "seen the matter, nor have they heard from their "ancestors of its being otherwise."[b] Such is the antiquity of observance and repute quaintly expressed in English probatory science, 'from time whereof the memory of man runneth not to the contrary.'

But law-framers have not left so signal a landmark of property and order as that established (rather, which develops itself) in the above reasoning, to be discovered or ascertained by reasoning and inference merely. We find arbitrary periods defined for growth of rights out of mere enjoyment without a *titulus*—for loss of rights by reason of their being negatively or passively abandoned.

Of this legislation[c] the Roman *usucapio* is the exemplar and starting point. The term translated is, use-acquirement; and it is thus vindicated and described in the 'Digest' or 'Pandects':—

"*Usucapio* was introduced for the public good, "*viz.* lest ownership of sundry things be left un- "certain for a long time and often for ever: seeing "that a fixed period would suffice for the diligence "of owners." (GAIUS) "*Usucapio* is, the obtaining "ownership through continued possession for a law- "defined term." (MODESTINUS)

The generic name for this kind of arbitrary acquisition and loss of proprietary Right, in jural science, is, Prescription—it is prescriptive.[d] The 'law-defined term' has varied considerably at different epochs and with different peoples; nor has it been measured merely by the obvious

requirements of reason, or of moral presumption: this is apparent in its earliest and latest instances.

Rome's XII. Tables fixed two years as the period within which legal measures must be taken to assert title to land against an intruder; and but one year for moveables. The Indian limitation law of 1859 stays claims for "any interest in immoveable property" after 12 years—and "for damages for injury to the person and personal property," after one year.

The subject of this last limitation, *viz.* claim to damages or compensation for injury, comes under the same general category, prescriptive title: for, as well put by professor Bell:—

'Prescription is negative or positive. 1. The long abstinence of a creditor from demanding fulfilment of a right or obligation is, on account of the danger of demands upon false evidence, of the probability of payment and loss of documents, of the equity of discouraging forgotten debts, and of the disfavour to one guilty of such negligence, held to be evidence of payment, or of a discharge or abandonment of the obligation; under the name of 'negative prescription.' 2. The 'positive' is the application of this principle to the fortification of a title to land—' (e)

The same writer observes (and his remark has a general import and significance, although made in regard to the Law of Scotland) '—there is no law introducing negative prescription, or any length of abandonment, as an extinction of property. It is

by positive prescription alone that a right of property can be established, however long the true proprietor may have neglected his right. And so the negative prescription is insufficient to extinguish any right or claim of property, unless there be an opposite right in the course of being confirmed at the same time.' This is true universally. Although civil Law cannot but assign a limit to doubt and suspense between claimants of property and rights, it nowhere inflicts forfeiture to the State of simply neglected interests, as merely derelict and seized therefore (like to heir-less property), for common use. There must, in such case, be a private occupier; some particular describable holder of the Right, either body-politic, or body natural; it may be, the holder does not take by originally effective title, but that he is one, in whose favor a positive prescriptive title grows, according to the special provisions of a particular jural scheme and system. Private ownership, as such, must exist somewhere, wherever there has not been, either voluntary, positive abandonment, or dedication to public use, by the owner—forfeiture for crime, to the State—or, absolute defect of representation, upon the owner's death. It is therefore only on contest of claimants, that any question of prescription or use-acquirement can arise.

I take from the jurist Thibaut, a few axioms relative to this head 'Prescription,' which are of general application, and which follow in due course.

from what has been premised: *viz.* '1. There can be no legal, definite prescription, whether to acquire or extinguish, without some express law. For, conclusions drawn by analogy are inadmissible on account of the singular [*i. e.* special, arbitrary] nature of the provisions relating to this matter—2. It is requisite that there be a continuous uninterrupted enjoyment of the positive or negative right prescribed for, and the right must be exercised by a person claiming it as his own——3. It is requisite that the appointed period of time should have expired——4. The thing must be one to which the doctrines of prescription are applicable [a description of excluded things are given, as goods stolen or forcibly taken, &c.] 5. It is necessary that he who is to lose by prescription should have been legally capable of asserting his right——consequently time does not run if there be no tribunal to which to resort.'

"Prescription", wrote Lord Stair in his 'Institutions', "altho' it be by positive law, founded upon "utility more than equity, the introduction whereof "the Romans ascribed to themselves, yet hath it "been since received by most nations; but not "so as to be counted amongst the laws of na-"tions; because it is not the same, but different "in diverse nations, as to the matter, manner, "and time of it——"

In a judgment of an American Court, which asserts the several Right of each State in the Union to enforce its own bar of limitation, it is observed:

"Prescription is a thing of policy, growing out of "the experience of its necessity; and the time "after which suits or actions shall be barred, has "been, from a remote antiquity, fixed by every na- "tion, in virtue of that sovereignty by which it "exercises its legislation for all persons and pro- "perty within its jurisdiction." (g)

(a) I am disposed to hold, that the word 'title' has never acquired among jurists a scientific or technical meaning: but that, as a colloquial synonyme or name (—for title is etymologically, what any thing is called, nomenclature—)it has the significations noted in the text; and in the English jural art 'conveyancing,' the word has a standard, perhaps a technical meaning. Austin considered the strict and proper sense of 'title' to be, all mediate or intervening and investitive facts, through or by aid of which Law indicates the person entitled to property or rights—as distinct from the inference or fiat of Law which gives value to those facts; concluding; "In short, wherever the law confers a right, *not* on a specific "person as being such, the law of necessity confers the right "through the intervention of a title. For, by the supposition, "the person entitled is not determined by the law through any "mark specifically peculiar to himself. And if the right were not "annexed to a title, it follows that the person designed to take "it could not be determined by the law at all."

But it may be said, each of the English statutes which respectively conferred (by legalising a crown grant of) 'Blenheim' upon Marlborough, and 'Strathfieldsaye' upon Wellington, was both a law and an 'investitive fact'—a title deed. So, the Right of distant kinsmen or of representative heirs *per stirpes* to a succession, arises from removal, by death, of those nearer heirs who intervened, which removals therefore seem investitive facts. Austin admits, in regard to this term, title, that, in a "large and loose significa- "tion—it is applicable to any fact by which a person is invested "with a right: it is applicable to a law or command which con- "fers a right immediately, as well as to an intervening fact through "which a law or command confers a right mediately."

In some sort, every title is a mere deduction of Law; for, as a contract is a *vinculum* attached by Law (*i. e.* some particular jural

system), to certain private acts or conduct; so, a proprietary Right is the result of legal inferences—in each instance a fiat of Law. Although a Right of property (or rather proof of one) is and must be a compound of acts and facts (in the colloquial and ordinary sense) with Law-doctrine; it is this, *viz.* the rule and dogma, which alone gives the acts or facts legal significance: *e. g.* the owner of a field puts a stranger in corporal possession of the field by abandoning it to him and his servants, by at the same time delivering to him a written declaration, or by evincing in other modes his intent to transfer the field in full property. Now, those are, undoubtedly, investitive facts; but, whether they are, or not, a title, is pure law-doctrine, varying with the specialties of each system, *viz.* whether they are, an English feoffment, an ancient Roman *mancipatio*, a mussulman *bye-bil-wufa*, &c.; and the omission of some seemingly insignificant form, as, a signature, a pretended weighment of a pretended price, some formal words oral or written, &c. may render the supposed investitive facts wholly inoperative as a 'title'.

Further, mere proof of the immediate cause, *viz.* the proceeding (how legally effective soever) of transfer from the late holder, must frequently be but an imperfect manifestation of a title, in the sense of proved ownership; inasmuch as that proceeding cannot intrinsically, *primâ facie*, represent or manifest more than the will of the immediate actors—certainly may not imply exclusive property or power of transfer in the late holder: *e. g.* if a Hindu childless widow make over, by formal valid acts, land of which she is apparently complete owner, the recipient's 'title', in order to be available, to be valuable, to have any strength or meaning (after the widow donor's death) against the husband's heir, must obviously include proof of the estate being *stree-dhon*, so as to exclude the possibility of its having come to the woman on her husband's death, by descent; nor would that ordinarily suffice, for the bestower of the land in *stree-dhon*, might or might not have had right of disposal.

(b) from Makeldey's *Systema juris Romani hodie usitati* (Hindenburg).

(c) European legislation is here referred to. The Sastras furnish most important and interesting collateral illustration of this necessary phase of positive Law: see Yájnavalkya, Bk. ii, sl. 24; and the notes to Röer and Montriou's translation.

(d) These terms are merely arbitrary and artificial, drawn from the old Roman formulary, *viz.* when the Prætor permitted certain long possessions, not coming within *usucapio* (which therefore did not

constitute an affirmative title), to be a good objection in resistance of the owner's suit. The objection was præ-scribed, written over the *intentio* (specification of the legal title to relief), as a preliminary bar to the hearing; the juridical meaning of 'prescription' has outstripped and superseded its early formal significance.

(e) In English Common Law, the term 'prescription' is confined to presumption, from long use, of a *titulus* (as, a lost deed of grant) to such rights connected with land as do not admit of continual positive possession, but are usually curtailments of the dominion of a possessor, *e. g.* a way, non-obstruction of light, pasturage, &c.; which therefore (to speak technically,) lie in grant, and which can be seized by suit only. It is thus put in the books:—'Nothing can be prescribed for, that cannot at this day be raised by grant; for the law allows prescriptions only in supply of the loss of a grant. Ancient grants happen to be lost many times, and it would be hard that no title could be made to things that are in grant, but by shewing of a grant. Therefore upon usage *temps dont, &c.* [*i. e.* 'from time whereof the memory of man runneth not to the contrary'] the law presumes a grant, and a lawful beginning, and allows such usage for a good title; but still it is but in supply of the loss of a grant; and therefore for such things as can have no lawful beginning, nor be created at this day by any manner of grant, or reservation, or deed that can be supposed, no prescription is good.' (Vin. Ab. *Prescription* U.)

In the English system, the term is inapplicable to that which admits of physical custody; this fact being in itself always presumptive of Right, until met in some way and explained. Further, Lord St. Leonards, in his 'Vendors and Purchasers' lays down,—"a title without title-deeds is not one which can be accepted without satisfactory proof that there has been such a long uninterrupted possession, enjoyment, and dealing with the property as to afford a reasonable presumption that there is an absolute title in fee-simple. But with such proof, a purchaser may be compelled to take such a title. Of course there are many good titles of which the origin cannot be shown by any deed or will." So that, naked possession may furnish a critically efficient, as well as a holding claim, Right, and *titulus*.

Kant well explains the intrinsic and logical character of this kind of title and Right, *viz.* a dispensation, by law, of the ordinary necessity for proof and of any specific jural act, as a claim to the re-

cognition and sanctions of Law. He says: '—it is absurd to allege, that an injustice may gradually become a Right by the mere fact of its having lasted long. Use (long continued) supposes Right to the thing [used], far from use being taken as a ground of Right. Consequently, *usucapio*, as acquisition of something by long use, is a contradictory idea. Prescription of claims, as a means of retention [which may be paraphrased 'title to hold'], is not less contradictory, yet furnishing a different idea from the preceding, as respects the argument of appropriation: for it is a negative principle, that is to say, [on the one side] entire non-use of a Right—such non-use as excludes what is needful to assert possession, such as stands for the jural act, relinquishment of Right; and, [on the other side] an exercise of Right in relation to some one else, with a view to shut him out from all claim (by *præscriptio*), and to acquire, by that means, the very subject of his claim: here is contradiction.'

Prescriptive doctrine is concisely summed up by Paulus, in the Digest:—'Age is accounted for a law.'

The Sastras and their glosses, in this as in other instances, evince the aptitude of the Hindu mind (anciently as now) for comprehension and expression of abstract truth: they contain much accurate delineation of juridical principles.

"Where possession *(sambhoga)* is apparent, but not title *(agama)*; "there, title is proof, not possession. This is a settled rule." (MANU, ch. VIII, sl. 200.)

Kulluka Bhutta's comment upon this text is;—'Where there is *sambhoga*, but no *agama*, such as purchase and the like, the proof is the *agama* or getting by the first holder, not *bhoga*.'

Note, he says the 'first' holder, *i. e.* primitive or first acquirer traceable.

"Title *(agama)* is stronger than possession *(bhoga)*; unless where "this has been continuous, from ancestors. But where there is no "possession at all, title has no strength." (YAJNAVALKYA, BK. II, sl. 27.)

Upon this text the comments of the Mitakshara are logical and significant. It must be premised, that the Sanscrit *sumbhoga* and *bhoga*, alike import 'enjoying', 'being in possession'; *agama* signifies the *causa*, *titulus*, upon which possession is had; *swa-twa* is, the abstract Right.

The Mitakshara——'Acceptance, purchase, and the like, which are the causes of *swatwa*, are, each of them, an *agama*; and the same is stronger than *bhoga*, since, as an index of *swatwa*, *bhoga* is dependent on *agama*. As says Narada—*Bhoga* becomes proof, when it is

backed by a perfect *agama*. When the *agama* is defective, *bhoga* cannot be received as proof.—Nor can mere *bhoga* be evidence of *swatwa*, since one may enjoy what belongs to others, by wrongful appropriation; therefore it is declared:—He who asserts *bhoga* alone, without mention of *agama*, should be considered as a thief, because of his urging *bhoga* merely as a pretext.—Wherefore, the text signifies, that *bhoga* together with *agama* is proof; also when it [*bhoga*] is long, uninterrupted, unchallenged or unopposed, and not concealed from the opposite party. Those five qualifications must there be in *bhoga* in order to make it proof. The latter part of the text, *viz.* "But where there is no *bhoga*, &c." is thus explained. If it be an uninterrupted *bhoga* from time immemorial, it may be admitted as proof without any reference to *agama*—not that there is no regard at all to the existence of *agama;* but that it is of no moment whether *agama* be in fact known or not, since the existence of *agama* is presumed from the *bhoga* itself. Thus, the first part of the half sloka refers to time within memory, and the second part to what is immemorial. Consequently, the substance of the law is this; within time of memory, *bhoga* must have regard to *agama* being ascertained, in order to be proof; for it might easily be ascertained whether there had been any *agama* or not: while, beyond that time, an uninterrupted *bhoga* is of itself proof, without the least reference to *agama*, since it is not possible to ascertain whether there was *agama* or not. By 'time within memory' is meant a century, as the Vedas say, "Man's term of life is one hundred years." Thus, if *bhoga* be continuous for a hundred years, without opposition from, and in the sight of, the other party; and if it be not certain that no *agama* existed, then *bhoga* is taken as an unfailing index of *agama*, and therefore as indicative of *swatwa*. But even in the case of time immemorial, *bhoga* is no proof, if there be traditionary evidence of there having been no *agama*.' And,—'Not even a hundred *bhogas* can constitute *swatwa*, if there be really no *agama*.'

Elsewhere, the Mitakshara, in explanation of slokas of Yájnavalkya that distinguish the position and holding title of an original intruder upon another's ownership from that of the intruder's descendants (Bk. ii, sl. 27 &c.), says: 'He who effected *agama* of land and the like, if challenged—whence is thy land, &c.?—is to prove that *agama* (such as gift and the like), by documents, &c. By this it is signified, that the first holder, when

unable to prove *agama*, is to be punished. But his son is required to prove, not *agama*, but simply an uninterrupted, unchallenged, and overt *bhoga:* that is, the second is to be punished in case he be unable to prove, not *agama*, but complete *bhoga*. Again, the son of the latter, that is, the third, is to prove, neither *agama* nor complete *bhoga*, but simply continued *bhoga*: by which is signified, that, the third is to be punished in case he be unable to prove, not *agama* nor complete *bhoga*, but only a continued *bhoga*. The reason of all this is, that, as regards the 2nd. and the 3rd., only *bhoga* is material; further, that though material for the 2nd., it is more material for the 3rd.: and the substance and purport is, that, when *agama* is not proved, the suit is lost equally with all three, but there is a difference with regard to punishment. As it is said—He who effected the *agama* is punishable, if he cannot prove it; not his son, nor his son's son: yet, *bhoga* is forfeited [in the absence of such proof] even by the two last.

Thus we have, in venerable and independent Hindu records of jural analysis, the correlative but distinct ideas clearly connected and enunciated, of, 1. actual having or enjoyment; 2. cause, title and ground of having; 3. the Right. To which may be added, 4. the variation between possession, adverse to a dormant claim, as it is original or devolved. According to the Mitakshara, as appears from the above extracts, the difference is not in proof or sufficiency of title, but in the penal responsibility of possessors. The equity of the case has been otherwise dealt with: the following is from a standard authority in English jurisprudence (anterior to existing limitation procedure and modes of claim to realty).

"The different degrees of title which a person dispossessing ano-
"ther of his lands acquires in them in the eye of the law (inde-
"pendently of any anterior right), according to the length of time
"and other circumstances which intervene from the time such dis-
"possession is made, form different degrees of presumption in favor of
"the title of the dispossessor; and in proportion as that presump-
"tion increases, his title is strengthened; the modes by which the
"possession may be recovered vary; and more, or rather different
"proof is required from the person dispossessed, to establish his
"title to recover. Thus, if A. is disseised by B., while the posses-
"sion continues in B. it is a mere naked possession, unsupport-
"ed by any right, and A. may restore his possession, and put
"a total end to the possession of B. by an entry on the lands,

"without any previous action: if B. dies, the possession descends "on the heir by act of law. In this case the heir comes to the "land by a lawful title, and acquires in the eye of law an ap- "parent right of possession; which is so far good against the per- "son disseised, that he has lost his right to recover the posses- "sion by entry, and can only recover it by an action at law. The "actions used in these cases are called possessory actions, and "the original writs by which the proceedings upon them are institut- "ed, are called writs of entry. But if A. permits the possession to "be withheld from him beyond a certain period of time without "claiming it, or suffers judgment in a possessory action to be given "against him by default, or upon the merits; in all these cases, B.'s "title in the eye of the law is strengthened, and A. can no longer re- "cover by a possessory action, and his only remedy then is by an "action on the right. These last actions are called droiturel actions, "in contradistinction to possessory actions. They are the ultimate "resource of the person disseised; so that if he fails to bring his "writ of right within the time limited for the bringing of such "writs, he is remediless and the title of the dispossessor is complete."

(Co. Lit. Butler's notes.)

The importance of 'possession' as a jural fact, irrespective of valid claim, inevitably leads to unscrupulous, violent and successful effort to change the status, in that respect, of concurrent claimants. Hence the Roman interdict *unde vi*, to restore, summarily, forcibly-wrested possession; which has analogies and supplements in modern codes. (See Dr. Sullivan's account of the introduction of the English 'assize of novel disseisin,' *Lec.* 31.) Besides, an actual possessor may of-course exercise the Right of private coercive resistance (*supra* p. 44) to violence. Enacted law, legislation, can alone create the artificial bar or title of *usucapio* and its supplement *præscriptio*, in the Roman sense; generally known in English Law as 'limitation' *i. e.* a law-defined limit to an excluded owner's remedy: and which imposition of a limit must always create, indirectly, a positive title.

(f) Thus Coke accounts for wrecked property vesting in the English crown from "two main maxims of the Common Law; "First, that the property of all goods whatsoever must be in some "person. Secondly, that such goods as *no subject can claim any "property in* do belong to the king by his prerogative, as trea- "sure-trove, strays, wreck of the sea, and others—" (2d. Inst. 167*b*)

(g) See Story *Conflict of Laws* § 582*a* no.[2].

SECTION IX.

ALIENATION, *viz.* TRANSFER OR CONVEYANCE OF RIGHTS, 1. VOLUNTARY, 2. INVOLUNTARY.

In the last section, possession or 'having' (a homely but effective synonyme) has been dealt with in respect of its relation with title, in its growth and progression, *viz.* from an imperfect, scarcely definable notion of present and vague (because uncertain, fluctuating,) benefit—a jural minimum or point—to an enlarged, substantial jural entity and Right. In this view, every possession, with intent and semblance of owning, has an intrinsic as well as a comparative civil value: the benefit of 'having' rolls on, gathering size and strength, until it reaches and stands (in idea and definition) side by side, as though twin brother, with that other *dominium* formally initiated, which needs not to grow or to improve, because born perfect and full sized. All-important also is possession, irrespective of growth and progress, as an obvious index of *dominium*, which it always represents, presumptively. Possession and *dominium* are alike movable, passing from hand to hand; the absolute type or test of the latter being 'title,' of which, as has been shewn, the lowest significance is, a cause and method of transit, as, sale, gift, exchange. *Dominium*, as a rule, includes or implies disposing power, the faculty of aliening (supra, p. 60); and the term *dominium* or ownership, although

specially and properly applicable to full property as above defined (pa. 60), is also applied to every distinct, even fractional jural faculty and Right.

There is scarcely a more difficult problem of jural science than this head of alienation, that is, explanation and analysis of the jural cause and act by which is effected, out of which arises, complete transfer of a Right. A formally pronounced resolve, a mental and express abandonment of the Right, in favor of some other qualified to hold and own that Right, reciprocated by this other one's pronounced acceptance; as—

I, A.B. make over to you C.D. my Right, z, and henceforth z is the Right of you C.D; with a response, I, C.D. accept the transfer and declare myself proprietor of z—

might seem, under all circumstances, to suffice. Yet, this formula can be but an expression of concurrent wills, a convention. Now, alienation—in that it is voluntary and inter-personal, an act of reciprocity, a result or product of distinct volitions—always includes convention, usually jural contract: convention is the basis, the antecedent and inchoate step in all alienation proper; by which is meant, other than the mere operation of death-succession or of judicial sanctions. It follows, that the jural fact 'alienation,' must be a step beyond, something more than, the jural fact 'contract;' seeing that this is but a commencement or part of the former—a first act in the drama of transfer. That first item or part may itself be (as before shewn) either mere words, or

a written record, or a symbolic action: whatever its character, a sequel is requisite to constitute, *i. e.* to complete, the alienation. Were it possible to trace, or rational to expect, in the early history of jural dealings, any philosophical scheme or science, rather than a rudely elaborate publication of such few interchanges and simple traffic of rights as are incident to the beginnings of civil life, then we might perhaps look for the practical simplicity of a published intent and acceptance, a contract, an effective bargain, having been received as jural completion of even a real transfer, *i. e.* of some material substance. But, abstract notions of Right or of ownership have never engaged nor occurred to the mind of primitive civil communities. Things, *i. e.* all enjoyable and tangible objects that rude men comprehend to be passable from owner to owner—such as, wild or easily raised fruits of the earth, spoil of the chase, cattle, pasturage, rough implements of toil or chase, dwellings and places of shelter, natural or rudely artificial—were and are doubtless continually, in the very earliest days, among any people, of the progressive idea of *meum* and *tuum*, made over from one holder to another, as well with partial as with entire and exclusive interest, by corporal act, by material signs and clumsy symbols; and this, prior to any literate or graphic representation of ideas and wishes being known or thought of. In the earliest times, even, as we know, in a more advanced epoch,[a] and among primitive peoples at this day, not the mental resolve or agreement, not

the conventional idea, but the ceremonial, the acted formality, the published and witnessed demonstration is alone regarded. Binding by mere words of good faith, abstract realization of Right or of transfer of Right, can there have no place (at any rate, in a civil sense or as a jural rule—[b]): such are tokens of Reason's growth and cultivation, of an advanced civil experience. So that, long before the possible elaboration of contract, we trace alienation as a jural formality and fact. Slowly and gradually has supervened understanding and analysis of the component parts of this vulgarly simple and single, but scientifically complex work and process.

It is thus apparent, that transfer of the position of proprietor, and of jural possession, are severally facts, but such facts as, according to each jural system, raise the jural conclusion of—property, or possessory right having shifted, under a contract or convention; further that, in the logic of jurisprudence, no mere mental act, no evidence of will, of agreement, not carried out by actual, potential, or constructive delivery of the subject *res*, works a positive change in ownership. A contract creates an obligation and a Right: from a sale-bargain arises, not any real or positive relation with the subject agreed to be transferred, but a personal claim to have the transfer made, a *jus ad rem*—Right to acquisition of the thing. That Right is distinct from any act or indication of transfer.

I proceed to a closer analysis of the act of

transfer, in its separate and distinctive character. An act of transfer, in conception and in fact, is necessarily two-sided: it is compounded of two distinct jural facts and acts, *viz.* on the one side, parting with, abandoning, for a purpose (*i. e.* the yielding to another), of some Right-external (—material, or lying in obligation merely—); on the other, accomplishment of the purpose, *viz.* the taking, occupation by that other, of the Right parted with. But, there can be no interval (—or an ideal one, a mathematical point, without parts or magnitude—), no suspense of ownership, no sensible extinction and revival, no solution of tie, if it be a real Right, between person and *res*, only a change of the person: it is the very incidence of the new taking and title, which unrivets the vinculum of the old. And the discovery of this necessity calls attention to the third idea and fact, *viz.* the precedent or concurrent convention, already noted; of which the influence and efficacy is felt and apparent in construing, in weighing, in appreciating the (logically, and usually in deed) sequent act of transfer. "Something external" wrote Kant, "is ac-"quired, either, by an act of individual will (*facto*); "or, by an act of the united wills of two (*pacto*); "or, by an act of the common will of all (*lege*)."

The second instance of the category is what we are now dealing with: invariably, concurrence of wills, merely united, or general, precedes the bipartite act of change in ownership: when united wills have matured into contract, this has become, as

above explained, an independent element and item —a stage, as well as a step—in the process of jural alienation.

From much that has been said, it is apparent, that the delivery, or making over, which is the main ingredient, the completion, the essential result and meaning of alienation, is by no means identical with material handing over of any substance or thing: this may, as observed by Austin, be 'pre-appointed evidence of a *titulus*', and, therefore, essential in the proof of ownership, 'and sometimes (for that reason) feigned to have taken place'. But, unless physical contact be made part of the technical title, it is a non-essential fact, not importing or necessarily indicative of jural tradition. (See Kant's distinction of physical from jural possession, *supra* pa. 66.)

On the other hand, unreserved alienation of any sort of Right, imports, *ex vi termini*, by its very name, that all jural claim, facilities and modes of enjoyment, as held by the transferring owner, have passed to the new owner: whether or not therefore, the physical power to use or handle the subject of transfer has or not passed, there cannot but be an actual or a virtual giving over of the subject, whatever it be, *viz.* either *de facto*, or symbolized, or, at the least, assumed, as a fact accomplished.

It follows, that, in order to describe or to understand, what is that delivery and giving over which is a component of civil or jural alienation,

further scrutiny must be made, of, what 'possession' is—what, the taking or acquiring, the maintaining, the parting with or losing, jural possession.

It was a Roman maxim, and one correctly enunciating an important general juridical principle, that, 'no one can himself vary the cause of his possession.' Here is meant, the 'just cause' above described as one of the uses and meanings of Title. A power over, or custody of, a subject of property having been acquired through some specific *causa, titulus,* and means, which *causa* turns out to be, either in itself defective, as a transfer of and title to the particular *dominium* or Right it had been assumed to confer, or else inadequate to the (perhaps dishonest) wishes and intentions of the holder and acquirer—in either case, neither of them, the victim of error nor the dissatisfied holder, can, singly, of his own mere motion and will, remedy and patch up the defect—supply what is wanting—much less alter the very character of the proceeding and basis upon which his claim and his possession, such as they are, are erected—from which they spring. So much is self-evident: thus—if the holder could not, originally, have created his own *titulus* or derivative Right—which, in its very definition and essence, must have included several concurrent wills, as well as acts of distinct actors—neither can the *titulus* which he has, be added to or changed by any inferior or less intricate machinery. Time (creating

judicial presumption (—though not in every case, *e. g.* of plain trust or of unbroken agency—) or positive law, may put age in place of a *titulus*, and so give fruition to his wishes and his patience: but, the holder himself can by no device or eagerness invest his holding with any new garment of Right, or actively give to himself another *titulus:* the attempt to do so, is, assuming to personate an absent, possibly a non-existent, seller or donor, to exercise another's *arbitrium;* it is, representation by one individual of antagonist actors in a bipartite transaction.

Yet was it also a rule of the old *jus civile*, that, conscious loss of physical power to eject a *de facto* holder, even mere apprehension and belief of inability, by the ousted owner, and consequent inaction, in so far furnished a mode of, or substitute for, jural as well as material transfer of land, as to work a change in the character (therefore in the ground and cause) of possession—and this, even where the holder had obtained his holding as agent or as depositary. Of the less considered and more easily handled sort of *res*, now known as 'personalty,' *viz.* what can be shifted from place to place with the person, jural possession was, for the time, lost, whenever the subject was actually appropriated by another, in any way, whether stealthily (*subreptum*) or violently.

This entire doctrine is a result and inference from another and more obvious one, *viz.* that, every

jural taker and possessor must have the *animus possidendi, i. e.* intent, consciousness, sentiment, of having: if he, actually or virtually, abandon or resign the *animus*, or, if the idea of its retention become impracticable and illusory—if, for instance, a jewel be lost or dropt into the ocean, or, a house be openly appropriated by a brigand force—the injured or loser may or not, in respect of the loss from which he suffers, become, and on just grounds, a *petitor* or complainant, seeking what is his—he may, perchance, pursue the offender as for a public outrage; but in no sense does he himself possess or hold that by loss of which he is aggrieved, either directly or vicariously. In such case—*i. e.* wherever all power to use or to have is at an end—the usurper, even though he be a fraudulent agent or bailee, can scarcely be said to have varied his title: rather, he has renounced his title, and proclaimed himself a wrong-doer; choosing the risks of this new character and status, one clothed with the chances of mere possession growing, through the owner's inaction, into proprietary title and Right.

Holding as jural possessor, and its consequences, in contrast with a mere holding title, are curiously exemplified in the English Common law of real property.

"By the doctrine of the feudal law, no person who "had an estate of less duration and extent than for "his own life or for the life of another man, was

"considered to be a freeholder; and none but a free-
"holder was considered to have the possession of
"the land. It is true, that estates were sometimes
"held for terms of years. In that case, the pos-
"session of the termor was considered to be the
"possession of the freeholder; but still the ter-
"mor held the possession, though he held it for
"the freeholder; and the freeholder, by trusting
"the termor with it, exposed himself to lose it, by
"the termor's negligence or treachery. If the
"termor left the possession vacant; if he permit-
"ted himself to be disseised of it; if he under-
"took to alien it either by act in *pais*, or by
"matter of record; if he claimed the fee; or if
"he affirmed it to be in a stranger;—in all these
"cases, the freeholder exposed himself to the loss
"of the possession, as much as if they were his
"own acts. Thus the termor held the possession,
"but he was said to hold it *nomine alieno*, in
"contradistinction to the freeholder himself, who
"was said to hold it *nomine proprio*. Hence
"Britton expressly defines an estate of freehold
"to be, the possession of the soil by the freeholder;
"and the author of the 'Doctor and Student' says,
"that the possession of the land is called, in the
"law of England, the franktenement or freehold:
"so nearly synonymous in those days was the
"possession to the freehold. In this manner, the
"possession of the termor differed from that of a
"mere bailiff, who had no possession. The same
"principles obtained with respect to the transfer of

"the freehold. Nothing further was necessary "than a delivery of the possession, or, as it is "called by our law-writers, livery of seisin. The "freehold could be transferred by no other means. "But, here a difference is to be observed with "respect to the effect of the livery of a termor for "years and the livery of a mere bailiff. On ac- "count of the solemnity upon which the entry of "the termor into the lands was grounded, the "connection between him and the reversioner, and "his actually holding the possession of the land "(though he held it for the freeholder), the livery "of the former was a transfer of the possession; "but the livery of the latter was absolutely with- "out effect.—Long leases for years also came into "use, and more settled and accurate notions were "had, of tenancies by sufferance and at will. All "these were considered to be in the same situation "as the termor for years. Their possession was "held to be the possession of the immediate free- "holder; but as they had, or rather held, the pos- "session, and were in by the act of the freeholder "in some cases, and by his privity or forbearance in "all, they were considered to be in, as of the seisin "of the fee. It sometimes happened, that persons "had the possession who had not the right; such "were tenants by disseisin, deforcement, abate- "ment, or intrusion. Still, as they had the posses- "sion, they might, by livery of it, transfer it to "another. Thus, by the old feudal law, on the one "hand, the freehold could not be transferred but

"by livery of seisin; on the other, livery of seisin "could not be made by any person who had "the possession, without transferring the freehold. "This transfer of the fee was called a feoffment. "No writing was necessary for this purpose; "and when charters came into use, the trans- "fer of the fee was supposed to be produced, "not by the charter, but by the livery which "it authenticated. But the material variation, with "respect to the form of transferring property "by livery, was, that originally it was usual "to make the feoffment on the land, before "the peers of the court, who subscribed the "charter of feoffment with their names; and "the entry of the feoffee upon the land was "afterwards recorded in the lord's court; but in "progress of time, the feoffment was allowed to "be good, though it were attested by strangers "only, and the recording of the feoffee's entry "was dispensed with. This, undoubtedly, lessened, "very considerably, the solemnity and notoriety of "feoffments—" (c)

Admitting then, the incontrovertible tenet, well defined (nor less ably proved and illustrated) by Savigny, that, 'Physical power is the *factum* which must exist in every acquisition of possession—,' we have to abstract from the essential idea of that power, and therefore from the idea of possession, all notion of corporeal contact: yet, with that power must be combined the intent and the consciousness which together are *animus possi-*

dendi, in order to generate the condition of things signified by 'possession.'

The result may be dogmatically stated—possession, as a jural fact, is; 'the power, with (*plus*) the sentiment, of having'—and this, whether the application be to a thing tangible and visible, or to enjoyment of a jural faculty or Right. I say, enjoyment, to avoid probable confusion, in this class of *res*, of possession or having, with claim and title to have. Jural *i. e.* rightful claim, is one thing; jural, rightful, or actual having, is another—the two united are plenary, rightful possession.

The particular term 'possession' seems scarcely applicable, in its usual and conventional sense (whether scientific or colloquial), to what is occasional merely, or, in its entirety, intangible, to what can be taken—sensibly or consciously had—only by fruition, by active exercise and use; *e. g.* a Right of way, to pluck fruit. To this class may be specially applied the dogma of Kant; —"every object whatever, exterior to my will, in "just so far as it is in my power, may be ac- "counted mine, juridically, without being in my "possession."

The name 'possessor' is incorrectly given, as a jural description, to one whose claim and Right is but to detain; as, if one have a bare pledge or a deposit. The apparent possession is vicarious, and in a special manner; the origin, cause, and meaning of the interest or relation created (which

is not purely substitutive, like that of the feudal termor) alike negative all idea of any self-asserting, proprietary effort or condition in him who *de facto* holds; another, the owner, is still possessor, in spite of his mode of dealing with—of the use he has made of and put to—his delegation of, that power and physical faculty which is an incident or part of his possession. (d)

What is the handing over, the alienation of possession, of title, and of the two united, I assume to be apparent from the preceding deductions and illustrations.

It also follows, that, symbolical (which is, typical and ideal) delivery, is not to be confounded with potential, custodial, subjecting, or even virtual delivery: the one is a supposition, an acted resolve; the other a fact, a resolve carried out. The former is illustrated by the handing over of a clod of earth, in token of transfer of a tract of land; the latter, by handing over the key of a locked up ware-house, containing merchandize purchased, to the purchaser: taking the key, is actual assumption of custody.

"That which I possess in my name, I can "possess as another's nominee; not that I thereby "change the *causa* of possession, but I cease to "be possessor, and, by the service I give, I "establish another's possession: nor is it the same "thing, to possess, and, as another's nominee to "possess. For he is the possessor in whose name

"possession stands. The delegate ministers to "another's possession." CELSUS

These dogmatical yet logical sentences of the Digest, explain and justify the apparently exceptional transfer of possession, which occurs when the owner parts with and makes over his dominical Right and his *animus possidendi*, while retaining his physical relation with and actual power over the subject possessed, even as before the transfer: the change is ideal and metaphysical, but strictly juridical and true; the fact of representation or of agency being, ofcourse, admitted.

'I, A. holding as jural possessor, now make over to you B. (by record, or token, or words, as may be,) my entire Right and interest in that which I hold; henceforth holding, not of or for myself, but for and of you, on account &c. (whatever the commission or delegation may be).'(e)

This doctrine or position, is perhaps rather a crucial application of propositions already advanced, as to possession and alienation, than any thing new or even supplemental.

The same reasoning and conclusions apply, when an owner desires to clothe his agent, by and through whom he holds, with the ownership: here, a new character has to be given to the position already occupied by the transferee, him to whom the transfer is to be made. It is the converse, or correlative of the former instance, *viz.* retention, by the party transferring, of a vicarious and limited possessory power; so, in this, of the agent, the

abstract Right only has to pass, and no physical change or movement need occur: the transaction is in will, not in action—the object and scope of the change is, not to clothe with power, but to withdraw restrictions that modify and hamper the exercise of existing physical power.

Savigny sums up the problem of vicarious acquisition, or acquisition through foreign agency, and such as excludes personal or direct act of the acquirer, in the question—

"How is it possible to acquire through the acts "of another party the consciousness of physical "dominion over a subject?"

An obvious and, although indirect, no imperfect solution of the problem may be thus stated; the notion and reality of such physical dominion is typified or instanced (and is therefore explained and illustrated) in the pursuit of, or in ability to pursue a possessory remedy against a stranger who has dispossessed the agent: such remedy, representing as it does a substantive Right (*supra*, p. 42), is more than an ideal equivalent of that physical relation or power which is required in order to complete the new jural possession.

"A man seems to have to himself *(apud se)* "whatever he has a legal remedy for; since, that "is had *(habetur)* which can be sued for." ULPIAN. *(f)*

There is yet another kind or phase of alienation to be treated of in this Section, *viz.* 'involuntary alienation.' To all but lawyers, this term may

seem to include a contradiction, in its negative element—a transfer against will. It is a transfer *lege* simply, the third category of Kant's analysis, *supra*, p. 190: it is the voice of the Law, the general will, in place of the *arbitrium* and desire implied in private traffic of rights: it is, a sanction, to enforce or to punish, when the Law's command is disobeyed, when a Right is violated: it is a process in execution of a judgment of Law.

In some sense, prescriptive title may be considered a result—a *fiat*—of involuntary alienation; being the Law's substitute for a proprietor's will, therefore a transfer *lege*. But, prescription differs from judicial alienation in this, that, although *invito domino*, it is a presumption from the owner's conduct, a conclusion generated by that conduct, a jural interpretation of that conduct—not an adjudication of contested rights, nor a penal sentence of deprivation. As before explained (pa. 177), prescription is a title, not a penalty: and, although what constitutes prescriptive title, in each jural system, is a postulate, a dogma of the science of proofs and of procedure, that postulate is but to assist and define the rational presumption—a dogmatical assuming of Reason's office, perhaps—and is something less than a judicial mandate, or a sanction.

Alienation of private rights, when made *lege, i. e.* by (as a result of) the general and public will, in contradistinction to individual or private will, is, —either (1), an adjudication, simply, carried out

by, or under terror of, the Law's sanctions, *e. g.* in a suit to enforce a contract of sale, the judge decrees, in his office of arbiter and guardian of civil liberty and of good faith, that the thing, or the Right, be given over, as contracted for ——or (2), an indirect, accidental consequence of adjudication, *e. g.* the judge finds a debt to be due, or, that loss and injury has occurred, as complained, and estimates the value (money-worth) which the claimant is to get, from the debtor or the wrong-doer; in order to realise or to make over that value to the claimant, conversion (*viz.* sale), alienation, or else coercive custody, of property, by officers of the Law, may be an inevitable mode of action——or (3), the judge, administering criminal Law, sentences one convicted of crime to forfeit property to the State (either in the form of value or of debt, or generally all rights of a certain class, or all that the criminal has, or a specific subject of property), which, by the sentence, becomes public property. This third instance is rather extinction than alienation of property: it is simply infliction, as imprisonment of the person, or forced labour would be—it is immediately within the definition of civil sanctions (*supra*, p. 15).

Conveyance, active transfer, of a private Right, under the first general category, of alienations without will (*i. e.* will of the owner), although effected without any apparent specific *animus*, as it is without any physical aid, of the owner, and by

a public officer, is entirely in accordance with, indeed in direct support of, that owner's civil liberty (*supra*, p. 33); he, of his own act, causes, though he does not effect, the alienation. Logically and jurally therefore, this alienation is not involuntary; but its incidents (because of their analogy) are properly classed and analysed here.

The second instance, *viz.* compulsory conversion, compensatory transfer—is the remedial action of Law, and a true involuntary alienation; no private or particular will can be implied here; proprietary rights of the helpless or the dishonest debtor, and of him to whom injurious loss is imputed, are given over *lege*, in order to adjust, to rectify, the dues and the damage adjudicated. The Right of remedy is thus recognised and applied. With respect to the title or the extent of Right so compulsorily alienated, it can be but a change of position, *viz.* from the proprietor or seeming proprietor-debtor, to the successful suitor: the Law's action cannot in such case (any more than the owner himself could) vary or improve the *causa* or title of a possessor. Finally, this judicial interference with and paramount adjustment (acting as a forfeiture) of private rights, seems to range under the *dominium eminens* (*supra*, p. 71). (g)

(a) Take the gradual progress of the *Jus Civile*.—"There seems "to have been one solemn ceremonial at first for all solemn trans- "actions, and its name at Rome appears to have been *nexum*. "Precisely the same forms which were in use when a conveyance "of property was effected seem to have been employed in the "making of a contract. But we have not very far to move onwards

"before we come to a period at which the notion of a Contract "has disengaged itself from the notion of a Conveyance. A double "change has thus taken place. The transaction with the copper "and the balance when intended to have for its office the transfer "of property, is known by the new and special name of Mancipa- "tion. The ancient Nexum still designates the same ceremony, "but only when it is employed for the special purpose of solemnis- "ing a contract.—Nexum, therefore, which originally signified "a Conveyance of property, came insensibly to denote a contract "also, and ultimately so constant became the association between "this word and the notion of a Contract, that a special term, "Mancipium or Mancipatio, had to be used for the purpose of "designating the true nexum or transaction in which the property "was really transferred.—The old Nexum has now bequeathed to "maturer jurisprudence first of all the conception of a chain unit- "ing the contracting parties, and this has become the Obligation. "It has further transmitted the notion of a ceremonial accompany- "ing and consecrating the engagement, and this ceremonial has "been transmuted into the Stipulation." *(Ancient Law.)*

The Mosaic account of Abraham's purchase (*Gen.* c. 23) of a family burial-place, neither alludes to symbol nor to record, but merely to wide publication of the contract of sale, and to payment of the price; in virtue of which the field "stood" to the purchaser.

"And Ephron was dwelling in the midst of the sons of Heth.—And Ephron "answered Abraham, saying, Pray, my Lord hear me! the land is 400 shekels of "silver—and Abraham weighed to Ephron the silver which he spake in the ears of "the sons of Heth, 400 shekels of silver, current with the trader. And the field "of Ephron, which was in Machpelah, which was before Mamre, the field, and "the cave which was in it, and all the trees which were in the field, which "were in all its border round-about, stood to Abraham for a purchase ['passed "over to Abraham for a property' (Kalesch)], *before the eyes of the sons of* "*Heth, among all entering at the gate of his city.* And afterwards Abraham "buried Sarah his wife in the cave of the field of Machpelah—And the field, "and the cave which was in it stood ['passed over' (Kalisch)] to Abraham for a "possession of a burying place from the sons of Heth." (Colenso)

But the part of the description which I have italicised, clearly shows, that the peculiar Jewish publicity, 'among all entering at the gate'—*i. e.* as the commentator Kalisch notes, 'in the presence of all the citizens,' not the mere contract, nor even the payment, was relied on, as the fact and the proof of transfer. See however *Jeremiah*, ch. 32, v. 7 &c.

(b) I interpose this caution, because I consider the phase or stage of civilization which closely assimilates distinctions of Right, jural faculties and remedies, to minute or strict analysis of the ethical claims of man upon man, to be, but a development and matured application of that moral intelligence which is essentially and necessarily human—in other words, of Reason: it is the new application, new working out of Reason, which potentially exists (though latent) even in the most primitive, in the savage, as in the advanced and polished, of mankind. Need the earnest student of history or the traveller among undeveloped races be informed, that rude, unlettered, crude-minded men have shown a nice sense of honor, a nice feeling and appreciation of justice, goodness, righteous dealing? This consideration will have to be pursued and enlarged on, in a subsequent section; as it bears upon the growth and varieties of civil Law.

(c) Butler's note, *Co. Lit.* 330*b*.

(d) The treatment, in the text, of jural possession, does not accord, in terms, with distinctions and modes often applied to it; but the difference is unsubstantial, and this explanation (agreeing even in terms with the views of able jurists) appears to me intelligible, definite, and logically consistent. Sir Erskine Perry's translation of Savigny's treatise, uses the phrase 'derivative possession' to denote what I have called 'vicarious;' this includes a part and excludes other part of the component idea in derivation; that is to say, it excludes all notion of jural transfer, as of jural substitution. A pledgee creditor's custody represents, besides the owner's jural possession, also a specific interest and jural power in the creditor, and which interest justifies his compulsory representation of the debtor and of all rights of the latter, including the possessory right; hence, in the *Jus Civile*, the creditor's possession or custody served to continue the prescription (use-acquirement) of the non-holding debtor.

The Roman remedy of 'interdict' was to protect lawful (*i. e.* plausible and peaceable) custody, irrespective of the jural interest or relation which that custody represented.

It is not correct to say (as Dr. Sullivan does, Lec. 31, *in fin.*), that the English borrowed the distinction between the Right of possession and the Right of property from the *Jus Civile*. The substantial distinction must be familiar to every system of proprietary rights, and was so especially in the early feudal relation of lord and vassal; the latter having a possession and

usufruct (precarious or assured) dependent upon the lord's *dominium*. A bailiff, a farmer, a tenant, always, each, had a possession, although, in each case, one differently defined, perhaps merely representative, even merely natural or casual, perhaps *quasi* dominical.

(e) Savigny argues,—"Whoever is in a condition, generally, to "acquire possession for another, by his own acts, is not the less "competent to do so, because, up to that moment, he, the agent, "may have had juridical possession of the subject." And he instances, 1. "Whoever gives a thing as a gift, and at the same "time hires it, may not say any thing in terms as to the pos- "session, but his intention is, that a contract of hiring should "immediately ensue between himself and the donee; it is, there- "fore, a necessary consequence, that the donee should be pos- "sessor, and he himself the occupant of another's possession—2. "The same thing happens with *ususfructus;* whoever, therefore, "gives away or sells an article, and retains the *ususfructus* for "himself, does, in fact, transfer the possession and the property, "and only proceeds to enjoy, like any other fructuary, the pos- "session of another. 3. If a thing is pledged, but at the same "time the use of it is permitted to the pledger, the possession "[*i. e.* such possession as may belong to a pledgee,] of the thing "is thereupon acquired by the creditor.—4. In a general partner- "ship, delivery of all the individual goods is looked upon as made, "directly that the contract is completed——"

Still, the transfer (or its equivalent), and the contract, are distinct. Together, they form the 'alienation.' The transfer may be other than actual, or ostensible, or physical, *i. e.* where express contract, or usage, or the necessity of the case (as in commercial co-partnership—and here, joint interest or proprietorship may be treated as an incident of status—) justifies a substitution of the *animus* for the act; in other words, substitutes the declaration, that possession has passed, for overt change—the will for the deed. The case is exceptional, and requires, in each instance, to be accounted for. It is familiar to jurists under a somewhat barbarous name, *constitutum possessorium.* Lindley, in a note to his translation of Thibaut's *Pandekten Rechts* (*i. e.* to the text defining what this mode or Right is), says, the doctrine is wholly denied by several jurists, and is termed by one 'a monstrous offspring of practice.' Savigny merely insists, that a *constitutum* is not to be presumed.

English commerce, the Law-Merchant, has introduced a laxity,

which varies, not the juridical rule, but its application. "In "Scotland [as was in Rome], property is not transferred, either "nominally or effectually, without delivery of the commodity—" (Bell's Commentaries). In English Law, however, the sale of a specific subject, where nothing remains to be done by the seller before it is to be delivered, passes the property in the subject to the purchaser, without delivery. In the words of Lord Wensleydale, (in *Wait* v. *Baker*, 2 Exch.) "—property does not pass until "there is a bargain with respect to a specific article, and every "thing is done which, according to the intention of the parties to "the bargain, was necessary to transfer the property in it." Thus, the English Law treats the fact, or legal inference, of appropriation, to which purely possessory remedies are, or not, attached, according to circumstances, (and see the nicety of the inference exemplified in the cases *Tempest* v. *Fitzgerald*, reported 3 Barnewall & Alderson, and *Atkinson* v. *Bell*, 8 Barnewall & Cresswell), as virtual and jural transfer—in other words, as equivalent to, or as constructive, delivery, or, as a conveyance of Right, as may be; while the Scottish Law requires, that the purchaser be put in the position of the seller, and that the sort of dominion and control, whatever it be, that the latter had, be made over in fact, nothing less. So that, the difficulty in doubtful English cases usually resolves itself (the contract being assumed) into one of two questions,—was there appropriation? or, was there delivery? In Scotch cases, the last question alone is material.

The French code, in terms, overleaps all logical or scientific distinction. The framers of that code, able as they were, were not jurists, but practical statesmen. Seeing the devices that had been used to avoid the extraneous ceremony of tradition, they boldly cut the knot by declaring;—"A gift duly ac- "cepted shall be complete by the mere consent of the "parties; and the property of the subject of gift shall be "transferred to the donee, without need of other delivery." (*Art.* 938.) And, "Property in goods is acquired and trans- "ferred, by succession, by gift, by testament, and by "the effect of obligations." (*Art.* 711.) And, speaking of Sale, "It is complete between the parties, and property is "acquired of right to the buyer, as respects the seller, as "soon as agreement is come to as to the thing and the price, "although the thing have not yet been given over or the price "paid." (*Art.* 1583.)

Thus, the *constitutum* or agency of the seller—his change of *status*, as it were—is declared to be the normal effect of every immediate obligation to alienate. As a French commentator (Marcadé) explains it, "—by the consent alone, the obligation to "deliver becomes fictitiously accomplished, and the delivery is "accounted made."

The English cases do not go so far. A valid contract of sale of a specified subject, and a compliance by the seller with all conditions on his part, entitle him to recover the price; because the purchaser has become invested with jural faculties to complete the transfer—it is for him to exercise them. But the French dogma of assumed positive delivery is not adopted. And the very form and necessity of those artificial enactments *(Co. Civ.)*, as indeed of all devices to supply the element of transfer or to bridge over the admitted interval between a contract and its performance, prove the doctrine and analysis of alienation, as explained in the text. Property is no doubt an ideal relation, but, by reason of the substance and material entity related, it is not simply an abstraction.

Nor can it be denied, that a laxity has been introduced by the English cases which invest the vendee of goods with an indefinite but absolute proprietary right *(jus in re)*, at least, in terms, by force and virtue of the mere bargain or contract—a real or *quasi*-real Right, which is, nevertheless, irrespective of and may not include possessory Right, *i. e.* any claim to use or to handle, to have; and this, although the single and distinct purpose of the contract on the vendee's part be, to get that proprietary possession—moreover, the holding Right of the seller (when it exists, *e. g.* when the price is due and unpaid,) not being a possessory Right and yet not a mere lien or pledge: see the cases, *Milgate* v. *Kebble*, 3 Manning & Grainger; *Martindale* v. *Smith*, 1 Qu. B.; *Fitt* v. *Cassanet*, 4 M. & G.; *Dodsley* v. *Varley*, 12 Adolphus & Ellis.

Surely, here is a backward progress, a reverting to the confusion between obligation and transfer, contract and conveyance, of very primitive jurisprudence. The confusion would seem to have insensibly grown out of an inexact use of the term 'property,' *viz.* to represent the claim of a purchaser who has not received the thing as bargained for: his Right is perfect, *i. e.* to have the thing made his; but the inference of actual appropriation from concurrence of intentions merely, is premature and unscientific. It is presuming a *constitutum*. (Yet, see per Campbell, C. J. *arguendo* in *Schuster* v. *McKellar*, 7 Ellis & Blackburn 719).

The *primâ facie* inconsistency in the incidents of the Roman *emptio-venditio* (as of the Scottish contract of sale), *viz.* that, although until delivery, the seller remains propietor, yet, after the bargain and before delivery, the commodity is at the purchaser's risk, is thus explained by Ortolan :—

"The seller remaining proprietor, as a consequence, if "there be an increase, by bearing fruit, by alluvion, from "any cause whatever, he it is who becomes proprietor of "the fruits, of the accretions; if the commodity deteriorate, if "it perish, his right as proprietor is lessened by so much, "or is extinguished. The Law speaks not, in such case, of "the Property. But what is the effect of the contract of "sale? It is, to produce obligations: the seller is under "obligation to deliver and make over the commodity to the "purchaser: and, if, after the sale there be fruits or accretions, "certainly he is under obligation to deliver those up: if the "commodity have lessened, or deteriorated without fault of "the owner, he shall not be then bound to make it over to "the purchaser otherwise than in its diminished or deteriorated "condition: should it have perished without fault of his, then "his obligations are put an end to." And this seems a rational "conclusion.

The above considerations of ideal, in lieu of actual and corporeal transfer, are ofcourse irrespective of those exceptional rights or privileges sometimes granted to creditors, to demand annulment or disregard of such transfer when made, as it may be, without publication or notoriety *(clam)*, because of its being a breach of commercial faith, and lessening, in an unfair and deceptive mode, the available assets of a debtor. Such special provisions have no bearing upon the principles governing the idea or the fact of jural possession.

(f) This view or dogma certainly does not include the doctrine of the English Chancery, that a vendee by contract, but who is compelled by the vendor's breach of faith to sue for performance of that contract, is to be regarded as, not merely having a right *in personam*, but as the equitable (therefore, jural) owner and possessor. This is one of many maxims and ethical syllogisms which guide the remedial action and jurisdiction of that paramount, prescriptive *imperium* vested in the Chancellor; but which do not modify nor affect the jurisprudence of property.

(g) The *pignoris capio* of early Roman judicature, the prætorian

emptio bonorum and *missio in possessionem*, the later *distractio bonorum* and *pignus prætorium*, each and all exemplify this coercive civil transfer of an owner's proprietary rights, wholly or partially, conditionally or absolutely. The *cessio bonorum* (parent of modern bankruptcy and insolvency laws) was introduced in mercy to the debtor. In Dalrymple's *Essay towards a general history of feudal property in Great Britain* is an interesting and instructive episode (written 1757) on the progress, there, of judicial alienation, which I extract.

"With regard to the involuntary, or legal alienation, which arises from "attachment for debt, the progress of it, natural and feudal, seems to be this. "The notion of borrowing under a promise of paying, is in general not very "natural among a rude people; their conception of obligation is but weak in "any case, and that of their obligation to fidelity is still weaker. All uncivilized "nations are observed to be cruel and treacherous; instead then of a promise to repay, "or of a written document in evidence of that promise, the borrower gives a pledge, as "a more solid security. Thus the old word in the English and Scotch law books, "*namium*, which at present we translate by the word Distress, signified anciently from "the Saxon, *pignoris prehensio*, the seizing or distraining of the pledge. From "the *Regiam Majestatem* and Glanville, it appears, that in consequence of prior "agreements betwixt the parties, this pledge, upon failure of payment, either "remained with the creditor, or, on application to the judge, was sold by his "order; and it is not improbable, that at that time, no moveables unless so "pledged, could be sold for debt; nor even when pledged could they be sold, till "after a competent time, and delay of payment; for so it is laid down by "Glanville and in the *Regiam Majestatem*: and a statute of Robert I. made "at a time when even moveables not pledged could be sold for debt, declares, "that even then they could not be sold for forty days after the attachment. "Before these days were elapsed, they were kept rather as a security for the "debt, till the debtor still delaying to pay, they were employed to extinguish it.

"The progress of the attachment of immoveables is the same. In the law "of the books of the fiefs they could not be attached for debt; nor could "they be attached by the Saxon law; nor for several reigns after that of "William the Conqueror; nor in the time of Glanville: on the contrary, the "only writs of execution at Common Law in England, were the *fieri facias* on "the goods and chattels, and the *levari facias* to levy the debt or damages "on the lands and chattels; neither is there the least hint of such attachment "in the Scotch *Regiam Majestatem*, or the Scotch *Quoniam attachiamenta;* "although in this last the method of attaching moveables for debt is most "exactly described, even the words of the brief, the duty of the sheriff, the "proof of the debt, the sale, or if no body will buy, the appraisement; yet "the attachment of immoveables is not mentioned at all. Nor at these periods "could the law, unless with an exception to be afterwards mentioned, be "possibly otherwise: the limited notions of power over property, added "to the interest of the lord against bringing in any vassal who was

"stranger to him, were insuperable bars to any further attachment. It "is true, by the *Regiam Majestatem*, (lib. 3. cap, 5.) and Glanville, "(lib. 10. cap. 8.) it appears, that land might be pledged for debt; and "from the same passages, compared with cap. 3 of the first authority, and "cap. 6. of the other, it appears, that in consequence of bargains concerning "such pledging of land, a practice had crept in, that the principal sum not "being paid, the land either remained with the creditor, or on application to the "judge was sold by him. But some of those cases being in consequence of agree- "ments, were branches rather of voluntary than involuntary alienation, and they "belonged more to the rules of private transactions, than of public Law: and "further, as no right of pledge was supported by the king's courts without "possession; the possessor of the land pledged, seemed in this circumstantiate "state to have acquired a connection with, and power over it, which facilitated "the notion of his retaining it, although the attachment of land by other cre- "ditors in general, who were not already in possession, was, it is certain, utterly "unknown. I say by other creditors in general; for though in the reign of "Henry III. we soon after find, that the king, and the surety for the king's "debtor purging his debt to the king, could enter upon the land for "the debt, and keep it till the debt was paid, yet this was a preference "special to the king; and as the surety had paid off the debt to the king, he "seemed to come in his place, and to have a right to enjoy his privileges. "But as the voluntary alienation of land was first freely introduced among "trading people in boroughs, so the involuntary alienation of it was first "freely introduced among the same people in the same places. Thus in "Scotland, in the laws of the boroughs, which were composed in the reign of "David I. the method of attaching and selling land for debt, is completely laid "down. By those laws, the creditor might enter upon the lands of his "debtor, and after certain delays sell them: the only restraint this attach- "ment admitted, was a right of redemption given to the relations of the "debtor; a right derived from the most ancient Law, and at that time "not totally eradicated even in boroughs. This attachment thus taking "its rise on the laws of the boroughs, and among trading men, was "afterwards extended to all the subjects indiscriminately; so that by a "statute in the reign of Alexander II. upon application of the creditor, "it became the duty of the sheriff to advertise the debtor to sell "his land in fifteen days, which if the debtor did not do, the sheriff was "impowered to sell it himself.—In the same manner it was, that the statute "*de mercatoribus*, introduced the benefit of statute-merchant first in England "in the thirteenth year of Edward I. By that statute, which was transplanted "afterwards likewise into Scotland, the merchant creditor was allowed, upon "failure of payment, to take possession of the whole of his debtor's land, "till he was paid off his debt: in that land too he was infeofed by the "Law; and upon the same plan of attachment with this statute-merchant, "the statute-staple was, two reigns after, invented. It is true, that the same "year in which the statute-merchant was introduced, execution upon judge- "ments, and common recognizances, by the writ of *elegit*, which was common

"to all the subjects, was likewise introduced. But the difference of execution "given upon this writ, and that given upon the statute-merchant, proves a "very wide difference in the attachment allowed among merchants, and that "allowed among the other subjects. The security by statute-merchant, gave "possession of the whole of the land to the creditor; but the writ of *elegit* "gave him possession of no more than a half: originally men could "not alienate at all, afterwards they were allowed to alienate, but not "beyond half of the feud: now, this principle, or rather rule, was "strong at the time the writ of *elegit* was invented, and the statute "*Quia Emptores* had not yet been introduced; therefore whatever stretches "might be found necessary from the circumstances of merchandise, yet with "regard to the kingdom in general, a small deviaton only was made from "the Common Law, and the *elegit* was permitted to affect no more by the "operation of Law, than a man was supposed capable of alienating by his "own deed. As the feudal law relaxed of its severity, and the commerce "of land grew more into use, the attachment of land by statute-merchant, "and statute-staple, was allowed to all the subjects in general. The statute-"merchant became nrst by practice, and afterwards by a statute of Henry "VIII. one of the common assurances of the kingdom: and though the "same statute of Henry VIII confined the benefit of the statute-staple "within its ancient bounds, so as to operate only for behoof of the mer-"chants of the staple, and only for debts on the sale of merchandize "brought to the staple; yet it framed a new sort of security, which all "the subjects might use. This security is known by the name of a recog-"nizance on 23 Henry VIII. cap. 6. and in it the same process, execution, "and advantage, in every respect, takes place, as in the statute-staple. But "in later times, when land came to be absolutely in commerce, this attach-"ment was thought insufficient; and therefore the act of the 13th of queen "Elizabeth, and the subsequent acts concerning bankrupts, established a "complete attachment of such lands as belonged to the persons specified in "those acts: instead of a half, those statutes laid the whole of the land "open to the creditor, and instead of a possession, which was all he had "by the *elegit*, or statute-merchant, or statute-staple, they gave him the "means of procuring a sale of the whole for the payment of his debt."

SUPPLEMENT.

In anticipation of the second part of this work, these general notes and suggestions are added, as a help to students.

Civil rights, as described in Section V. range under three heads or classes;

1. Inherent personal attributes: in regard to which civil Law rather recognises than establishes rights; *e. g.* Right to life, to self-respect, to good faith.

2. Civil relations, or adherent personal attributes, *i. e.* of status; these are various in kind and in origin; as, claims of paternity, of office or of rank.

3. External acquisitions, being claims to have or to enjoy things, services, benefits; *e. g.* land or fruits of land, men's labour.

The third class is divisible into; 1. such acquisitions or claims as consist in some definite relation to things; as, property in or out of land or other substance whatsoever, and are therefore rights of universal exclusion; or, 2. such as are claims against some determinate person; *e. g.* rights under a contract, or other Right (*i. e.* remedy) against some person, as, for infringement of any Right ranging under either of the classes 1. 2.

The subdivision No. 1 of 'external acquisitions' is equivalent to Austin's *jus in rem*, usually rendered, Right over or in a thing (—a more correct translation would seem to be, Right towards or with reference to a thing—), denoting, says Austin, "the compass and not the subject of the "Right." His original English definitions cover and distinguish phases of Right, *viz.*

"Real rights may be defined in the following manner: "Rights residing in persons, and availing against other per- "sons generally." and,

"The following definitions will apply to personal rights: "Rights residing in persons and availing exclusively against "persons specifically determinate: or, Rights residing in "persons and answering to duties which are incumbent "exclusively on persons specifically determinate."

Austin adds,

"As every imaginable right belongs to one of these "classes [*jus in rem* and *jus in personam*], or else is "compounded of rights belonging to each of these classes, "it is manifest that a full exposition of this all-pervading "distinction were nearly equivalent to a full exposition of "the entire science of Law."

A specialty attends one mode of status-rights, in the several kinds of power, of control over the will, the liberty, the *arbitrium* of the subject-person, whether child, ward or servant, which distinguishes it from other claims *in personam*. Such status-relations entitle to the exercise of a class or series or repetition of claims upon determinate persons, as distinguished from particular claims having separate authorizations. In viewing, classing or accounting for the former, we regard the personal specialty or position of the claim-holder: in the latter, we regard the claim or the act conferring authority.

The former Right, although met by a correlative obligation in a person or persons determinate *e. g.* the ward, clearly does not belong to the same category or class as rights represented by persons merely, *i. e. vincula* (bonds), dues, whether contractual or the result of injury. These reflect nothing adherent to the Right-holder's person; they issue, entire, from acts, from the person, of the Right-bound. Austin, however, treated status-rights as having a double aspect, 1. *in personam* as regards the person who is the object of the Right (*e. g.* the ward), 2. as general or negative, and binding all persons, not any determinate person, and therefore, in this aspect, as strictly personal rights. Kant classes as mixed or per-

sonal-real rights, the parental and the dominical; a view substantially adopted by Austin, in his explanation of 'rights *in rem* over persons.'

It may be said; childhood, wardship and service are, severally, terms indicative of a subjection and rule, more analogous to political domination than to proprietary; but distinct from both the one and the other. The first, *viz.* 'filial subjection,' is, in origin, a purely natural ordinance: the last, *viz.* 'obligation to serve,' is simply, either contractual or punitive; meaning by 'punitive' all gradations of involuntary and unrequited or compelled servitude. The ordinary relation of 'master and servant' has its beginning, its continuance and its force in contract; but, while the relation lasts, any interference (as explained) with the servant that can in any way trespass upon what he is under obligation to render to his master, whether it be an interference with the servant's ability or with the servant's will to give his contracted services, is, or may be a wrong in a double sense, *viz.* an injury to the servant personally and directly, also an injury to the master's position, to the master's property and existing Right in the presumed benefit of services which are thus placed out of his reach, or diminished in value, by the wrong-doer. So, on the other hand, any illegal interference (*e. g.* defamation of the servant) which deprives the servant of his correlative advantages in the mutuality of contractual status, is a wrong to the servant. And a case may be supposed where a reciprocal injury to the status-Right of each is the result of one wrongful act, *e. g.* the master is induced by some maliciously false report to dispense with the service, or (a case more strictly in point) to change its character prejudicially to the interests of both.

Austin objects to Kant's distinctive name, personal-real (calling it, an innovation upon the established language of the science,) as unnecessary, since this is, Austin

affirms, but the same kind of Right as 'to or in a thing.' But, the objection seems hypercritical. A capital obstacle in study of jural science (so Austin himself has emphatically acknowledged) is, the absence of any established language. And we are warned in the Digest, 'there is a risk in every civil-law definition—' (JAVOLENUS). For risk, may be read, doubt, uncertainty. Rights and distinctions of rights are variously defined. So indeed must it be with all abstract moral reasoning: no original thinker implicitly adopts or falls in with the terminology of any predecessor—a rule, of which Austin is a distinguished example.

There is, undoubtedly, ground for Austin's conclusion—"To fix the notion of 'status' with perfect exact-"ness, seems to be impossible."

The compensatory or remedial Right (pa. 42) is always *in personam*, virtually if not in terms; for, it necessarily affects and aims at a particular invader of a Right, which Right must operate restrictively, either upon some determinate person, or upon all without exception. Of the latter sort, immunity from bodily hurt; of the former, a Right of usufruct, are instances. Judgments or adjudications affirming or establishing rights, of-course vary in description, as the rights themselves do, *viz. in re, in personam, &c.:* but the judicial act commonly includes some order entitling to a new specific acquisition or claim. Every thing given by a judgment to the complainant, is a new, remedial, established Right, in substitution—perhaps, but solemn, authoritative renewal—of the Right which was the cause and subject of the litigation: *e. g.* an order, that a contract be specifically performed—that an instrument to convey or assure property be executed—that a like instrument, or a written obligation, be cancelled or delivered up—that a nuisance be abated—that a sum of money be paid—that possession of any *res*, as land, be given or

restored (either as an order to or upon the person merely, or directly by forcible interference *i. e.* by legal process)—that a certain Right be not exercised during a definite time or under a certain contingency—&c.

The word 'obligation' has several jural meanings. It has been already used as the general correlative of Right: it has however distinctively a three-fold sense; *viz.* 1. the tie of contract; 2. the result of infraction of a Right, *e. g.* injurious damage to property; or, 3. a mode of action or of abstinence specially commanded by a law; as, to pay a tax; not to grow tobacco.

The obligation 'by law,' as a class, includes all jural duties, obligations, requirements, other than those advisedly self-imposed, *i. e.* framed by the will of the obliged in concert with some particular fellow-will.

It therefore includes, among others, all duties that result from acts entailing involuntary obligation, *viz.* wrongs. Some of this wide class (by law) are not specifically defined, indeed are scarcely capable of exhaustive description.

The facts that originate, or lead to remedy upon contract, *i. e.* resulting from contract-obligations, are, the incidents of each species of contract as well as the incidents of (*viz.* what constitutes) every possible breach: they are, necessarily, numerous (perhaps innumerable), elastic, and varying with the ever-changing, multiform necessities and desires of men.

Contract is a voluntary variation of the civil boundary of each man's liberty (pa. 33). Obligation from delict or wrong is a penal and compensatory variation of the same boundary, *viz.* sanctioned extension of the line limiting A's range of civil action, into and across the correlative line or boundary-limit of B. Pursuing the metaphor, civil obligations are identical with the entire boundary that limits each one's range. The contract-obligation and the delict-obligation vary in their formation or immediate origin, not

in operation; for each is the voice of Law: in each case the obligatory tie and fact is, specifically, that the State has said, *ita jus esto*, which may be explained and paraphrased—so the Law commands.

Roman and other jurists have treated of *quasi*-contract and of *quasi*-delict; and, in English Law is a head of 'implied' contract and 'implied' covenants. I venture to think each of these sub-divisions superfluous, even if scientifically admissible. For instance: Law declares, that one who, of his own accord and without authority, assumes to represent another in his social status and responsibilities, *e. g.* as a trader or artificer, or, to act as though he held (when not holding) a commission or delegation —is vested with proportionate liability, that he incurs, by so volunteering, a risk of damage to himself, however well-meant or disinterested or morally justifiable his officiousness. Here is a *quasi*-contract. Now, as regards the person on account of whom the acts of interference are performed, we find no definite station within the broad jural domain of 'contract and wrong' specially appropriate to this class of proceeding; unless, indeed, on the one hand, the beneficial effect of the assumed status be held juridically tantamount to assent of the person represented —and, on the other, failure or prejudice in result, be held to determine, *ex post facto*, the wrongful character of that assumption. But this, obviously, can not be admitted. Subsequent assent may well be logically retracted, so as to legalise (or waive complaint for) a prior equivocal act. When no such assent is given, the interference, if not a punishable offence, is either an immaterial injury, *i. e.* an act infringing Law, but innocuous (*sine damno*)—or, it generates a delict-obligation, an actionable wrong, within the definition lately promulgated by the highest authority, *viz.*—'something which prejudicially affects plaintiff in some legal right.' (*Rogers* v. *Dutt*, 6 Moore's Pr. Council Indian cases)

The implied undertaking (*assumpsit*) or contract, in English Law, is simply evidence of a conventual obligation, or, at the most, a jural postulate, a conclusive presumption proving the *vinculum* or legal tie: *e. g.* I send to a baker for a loaf of bread—surely, the public character of the baker's calling, and my requiring the loaf, are facts significant of a purchase—in other words, those facts are evidence, and, unexplained, lead inevitably to the conclusion of an ostensible offer, on my part, to pay for the loaf—in English-law technical phrase they 'raise an *assumpsit*.'

Neither is mental intention, nor is the holding out a resolve (as an inducement for reciprocity or trust) to be shewn by words (whether written or spoken) alone: there are, to the eye of common-sense, many other tokens of either fact.

Again, if an instrument of transfer simply testify, that a seller, for a certain price, 'grants' to the purchaser the thing sold, but does not contain any words of contract or any express provision beyond the mere fact of purchase and sale; nevertheless, if it turn out, that the seller has no Right (although he believed himself entitled) to the subject of sale, and the purchaser be, in consequence, ousted or turned out of the enjoyment upon which he had entered and which he supposed he had bought, then, under English Common Law, the disappointed purchaser might complain of breach of the 'implied covenant' contained, wrapt up in the word of transfer, 'grant,' *viz.* the implied covenant or undertaking that he, the seller, had the power and title to do what he then assumed to do: if he had not, although may-be self-deceived, he cannot escape from his contract; for, *ex vi termini* (by the very import of the term) alienation supposes and includes contract, as shewn in Section IX.

Quasi-contract, Austin describes as denoting—"any incident by which one party obtains an advantage he ought "not to retain, because the retention would damage

"another; or by reason of which, he ought to indemnify "the other. The prominent idea in *quasi*-contract seems "to be, an undue advantage which would be acquired by "the obligor, if he were not compelled to relinquish it or "to indemnify." And see 'Ancient Law' pa. 343.

Every fault or offence is a breach of obligation. It is either, a violation of a civil Right, or, an act which violates or endangers public order, public decency, the well-being and peace of the State: it may be both at once, as, killing or personal injury to a magistrate or State-officer: it may affect the whole community in another sense, as, breach of a contract to supply the army with clothes.

With regard to the division of offences into *culpa* and *dolus:* as inexcusable negligence is *culpa;* so, a great *culpa* has been deemed jurally equivalent to *dolus.* This was Roman doctrine, and indicates intermediate degrees or stages of wrong; *viz.* 1. between what is civilly imputable as an adjustment of loss, not being any breach of moral Law—and *culpa,* a fault; 2. between an injurious, culpable act, immoral perhaps as evincing general rashness or carelessness, but not a result of vicious will in the particular instance—and *dolus,* designed wrong.

Self-preservation, self-protection, mutual protection, are natural Rights; as, revenge, retaliation for wrong, are natural and universal propensities. The State, in absorbing all rightful power to punish and to protect, overrules, disallows and supersedes those rights and those propensities (at all events, in ordinary exercise and occurrence), analysing their origin, their motive, their necessity—thus substituting Order and Reason for Disorder and Passion. In this view, and as a civil legal substitute for wild instinctive vengeance, penal laws are closely allied to the philosophy of moral action, and depend upon moral definitions and distinctions.

Mr. Senior, in his biography of the French advocate, Ber-

ryer, notes the terrible elasticity of national morals that may consist even with advanced civilization (as far as this is evinced by refined manners, and learning,) *viz.* as instanced in the dislocation of social bonds wrought by the political revolution of France at the close of the 18th century. He says—"Mons. Berryer's narratives of his con-"tests on questions depending on marriage, divorce, and "legitimacy, are interesting. They describe a community "unsupported by religion, delicacy, or morality—in which "virtues had so often been declared to be criminal, and "crimes to be virtuous, that public opinion had been des-"troyed, and with it, conscience and even the self-respect of "individuals."

That portion of the manners of a nation which, although they go, with the rest, to fashion its individuality, do not pass into Law, form a conventional code, having conventional sanctions depending upon the 'reflex sentiments.' With a vain or sensitive people, such by-laws of the social system have paramount sway. Sterne's apostrophe, "Hail, ye "small sweet courtesies of life!" alluded to no part of the universal code, recognized by all, but to those lighter yet important virtues characteristically designated by the Parisian *les petites morales.* Honour, gallantry, modes of dress, of address, of taking food, a polite demeanour—here is the area of the minor moralities or modes, which vary even beyond the variations of civil Law, and the infraction of which are *mala prohibita,* frequently entailing severe, if not cruel, resentment and retribution. Such rules are sometimes found (illogically and unreasonably) translated into civil Law, *e. g.* where mere cast-distinctions, ritual formalities, fanciful or speculative notions in things indifferent, are civilly enforced, as with the Hindus and other ancient peoples. See Mr. Grote's exposition of *nomos;* 'Plato,' vol. 1, p. 249 &c.

On a mere impressional view, formal enactment seems scarcely indispensable for criminal any more than for civil rules of municipal Law. Common (or judicially-promulgated) Law frequently includes both classes; official legislation, as to both, substantially, recognises or amends rather than creates rules. A Jeffreys can enlarge a penal code by construction; as the resources of a Mansfield find new aids to commerce in the yet unfathomed depths of contract-law.

Nevertheless, it may be adopted as a principle of modern jurisprudence, that the application of punishment, in other words, the criminal Law, does not admit of enlargements or novelty by construction or analogy. Direct and literal command, the voice of Power, is here needed: there is no necessity, no excuse for elasticity, for equitable extension of the laws of crime. Social arrangements, from their indefinite variety and complication, do furnish a reason and a demand for elasticity in rules and modes of intercourse: punishment, penal sanction, is something else—it is not inflicted to satisfy any individual or any section of the community, but to vindicate the principle and the existence of order, every infraction of which (at least in theory, constitutionally) concerns all, in equal degree. Hence, the origin or formal approval, the precise demarcation, the promulgating of this all important class of civil laws, consistently and wisely rests with the proper legislative function. Popular opinion or customary observance cannot, with an advanced community, originate or gradually introduce an unpromulgated crime.

"Crimes" writes Mr. Stephen "are actions punished by "the Law:" and he instances the English statute 34 Hen. viii, which prohibited reading of the New Testament to all save a privileged class, as showing the arbitrary character of the definition of crimes in any system—that it is the mere creature of sovereign will, of legislative power.

The editor of the 5th edition of Hawkins' 'Pleas of the Crown' (published 1777) thus notices the encrease of Eng-

lish penal enactments during the preceding sixty years:—
"The encrease of commerce, opulence, and luxury, since that "period, has introduced a variety of temptations to fraud "and rapine, which the legislature has been forced to repel, "by a multiplicity of occasional statutes creating new of- "fences and inflicting additional punishments."

In one sense, every sanction, although the sequel of a civil remedy merely, is penal and criminal; inasmuch as it threatens and indicates suffering for disobedience. But, in such case, an appeal is made to the sense of compensating justice in the mind of the wrong-doer; terms are offered to him; Law but demands his co-operation to repair a fellow citizen's loss, adjudged to have resulted from his error, his ignorance, his carelessness or his wrong-headedness; if he slight the Law's demand, he necessitates a resort to coercive and retributive action, ultimately—a very different affair from the direct retribution following an act in contravention of a mandate of criminal law.

Dr. Whewell, with his wonted philosophical accuracy, distinguishes between the *fact* and the *idea* of rules of conduct; applying the former to existing systems of human Law, the latter to the universal principle, to be discerned by Reason, which is, therefore, the real standard of 'right and wrong'—the veritable *nomos* of Plato's Socrates. The 'positive laws' of Austin's school are the 'fact' of each defined, contrived system, whatever that be, and whatever its relation to the real standard. If, with Paley and Bentham and Austin, we make 'utility' a key-note, a criterion whereby to adjust the harmony of any regulated system—to test what is, by what ought to be; still, that utility and its standard are, an idea, an opinion—at the least, a reasoned result—and easily distinguishable from the positive facts of a national code or law-scheme, evolved, generated, and nurtured, as such must be, by the accidents of each nation's history.

Equity, as a juridical term, I consider to denote, the difference (overplus or balance) between each people's promulgated national Law or civil scheme of conduct—and the collective moral sense or conscience of the same people. English Equity was originally an appeal to the royal conscience from the rules administered by the Courts, to supplement their shortcomings, to modify their rigour and severity. This delicate and difficult function of the Executive happening to be delegated to members of the Roman hierarchy, accounts for much of its character, both in substance and form. Equity is, the national morality, as understood and interpreted by the administrator for the time being, formalized and adapted to the exigency presented.

The simplest and most direct mode of arriving at a conception of inter-national Law is; to realise and complete in one's mind the idea of mankind without civil Law, *i. e.* in a (supposed) primary stage or condition, not having any special or artificially organised rules of government or of conduct. Yet, in such a state of things, mankind can not be counted lawless: no man with reference to any other man is free from obligation, if and when the two are any way brought into contact, in action, in interest, in affairs of life; whenever their interests or wishes clash. For every such case, there undoubtedly is a law, self-existent, and discoverable. We cannot imagine any mode of collecting or grouping families of men, however unfettered by civil rules, however various, however strange to each other, which, reflection upon and observation of the condition of material as of moral nature, do not at once convince us, involves some mutual link, of sympathy, of needs, of possible society and its consequent obligations. If so, is not this a Law of nations? For, the original, the self-existent Law, binding the entirety, is obviously not repealed or abrogated by the circumstance (whether accidental or necessary), that, some of the groups

or families have coalesced under new or artificial bonds. The original link remains; having, in addition, some reference to and bearing upon the subordinate civil formation. The civil structure does not supersede or vary the fundamental necessity, *viz.* that Man is linked to Man, more than potentially, as a universal and natural truth.

Austin seems indignantly to repudiate the notion of growth of Law from popular habit or from opinion; condemning the several Roman definitions of (what may be called) inevitable Law: *viz.* a *jus* which Nature has ordained among all men; a *jus* established by habits; a *jus* raised and contrived by the learned.

To reject all historical and philosophical bases or building up of human coercive rules, and to substitute the naked authoritative command as an arbitrary, self-existent cause of Law, is one thing—to insist that the many accidental, moral, and political elements or motive-powers which go to produce Law, are not separately or collectively, cognizable as Law, until promulgated or recognised by those political organs (legislative or judicial) whose fiat of recognition announces and inaugurates birth of Law, is another. The former sentiment or dogma annihilates, it is submitted, all science of jurisprudence or of Law,—at any rate, reduces what should be a science, substantively, to a mere dialectic formulary and terminology: the latter proposition, however, is a fundamental truth, and rightly distinguishes the result, the consequence, from the process of formation. This view it is, which underlies, which accounts for, the seeming (the really superficial) antagonism between Austin and Savigny.

Austin himself thus describes certain modes of unwritten Law; *viz.*

"Owing their existence, as positive Law, to sovereign or "inferior judges, although they are shaped by the judi- "cial legislators on customs current in the community or "on opinions of private jurisconsults."

He also admits,—"Much of the positive Law obtaining "in any community, is custom turned into Law by the "adjection of the legal sanction"—and elsewhere, "Certain "laws are so obviously suggested by utility, that a per- "son of small experience (if not affected with insanity) "would naturally surmise their existence." And, when defining 'privileges'—"They are mere anomalies: exorbi- "tant or irregular commands proceeding from the legis- "lature; or, what in effect is exactly the same thing, "eccentric customs tacitly sanctioned by the legislature."

Dr. Maine treats customary formation of Law as the secondary epoch in juridical history, *viz.* that succeeding the purely despotic or patriarchal, in which every occasional solution of differences among the governed was the birth of a legislative decree or *themis*, an *ex post facto* but heaven-inspired rule of right: to which simple archaic plan, succeeded the customary.

The same jurist crystallizes the conditions of mankind under the *quasi*-instinctive operation of primitive social habit, into varying *formulæ* of status—a negation of 'agreement,' in any sort, direct and immediate, or remote; and thus concludes his able historical analysis—"We may say, "that the movement of the progressive societies has hith- "erto been a movement from status to contract."

Holding, as I do, that any narrative of the operation of human wants and wills and dispositions, can but illustrate and apply (thus pointing the inferences of) ethical and jural truth; I would say—Voluntary union of wills and of human purposes was always, in fact, convention and agreement; when a civil sanction was added, it became contract, *i. e.* the civil *vinculum*. It is perhaps difficult to over-rate the silent and, as it were, instinctive influence of the original family-grouping upon what we may call (borrowing a term of geology) the world's juridical formations.

The archaic or primitive social fabric is portrayed in strong relief by Dr Maine, who describes its ever-living influence—

"older probably than the State, the Tribe, and the House, "it left traces of itself on private Law long after the "House and the Tribe had been forgotten, and long after "consanguinity had ceased to be associated with the com- "position of States. It will be found to have stamped it- "self on all the great departments of jurisprudence, and "may be detected, I think, as the true source of many "of their most important and most durable characteristics."

Connexion in blood, real or simulated; a despotic father's commands; a perpetual corporate entity; undivided responsibility; slavery; elastic absorption of strangers into the union—such were, severally, characteristics of the varied *nuclei* or kernels, from and around which primitive States grew or were fashioned. To those characteristic landmarks and stages of the earliest social progress, succeeded more mature indications, belonging to the youth or to the early manhood of civilization, *e. g.* the *themistes* (despotic judicial awards), customs, codified texts, and, above and before all, contract or compact, *i. e.* deliberate, systematic joining of individual wills; for—"The necessity "of depending upon assurances made by other men, gives "birth to a Right in the person to whom the assurances "are made—" (WHEWELL): and the necessity must always have existed, that is, as soon as two independent wills existed. The earliest compacts may be compared to mastication of food by a child, followed, as it must be, by the elaborate sequences effecting conversion of that food into blood; and (completing the analogy) the contracts of an advanced civilization may be compared to the same physical operation by the mature jaws of the conscious man of science. Are not the two operations, with their consequences, essentially identical?

That mankind are one, in race and origin, is (although not universally received,) an ably worked result of learned investigation—a synthetical deduction from established results. From the physical and moral wants, from the congenital

(or, at least, natural) differences of the first human progeny, and from the changes wrought by migrations, we may obtain a sufficient approximation to what the early jural steps of mankind really were, to serve as a starting point for research into what is reliable in history. Yet we must proceed warily. Hermann, speaking of the Trojan war, the theme and scene of the Iliad, says:—

"Although not a few of its earlier traditions may be "founded on fact, and contain traces of real transactions, "these are so interwoven with myths and enveloped in "allegory, that the most penetrating genius is incompetent "to restore them to a complete and connected historical "whole. This remark is still more applicable to the do- "mestic history of a people. There can be none, till a "nation has by its own spontaneous energy attained that "individuality, in which by displaying peculiarities of "character, it becomes distinct from all others. In the "case of the Greeks, this national character was develop- "ed through a course of violent commotion, revolution, "and migration, closing with the invasion of the Hera- "clidæ and its consequences."

Perhaps no safer authority or instance could be given than this extract, in order to exhibit, generally, the extent to which archaic research, in the field or mine of history, can furnish the facts, the actual proceedings of the earliest struggles in politico-social order. We are thus compelled to reason, for the most part, from results. We garner the facts of juridical science, by which to illustrate, to test, to trace that internal frame-work of axioms, that circulating original principle, which must be the life and support of the structure,—*i. e.*, of jurisprudence.

Austin, in his 'Notes on codification' lays down:—"The "historical school of jurisprudence, so far as they are "right, concur with every body. Their peculiar views of "the value of history, exclusive of philosophy, are wrong.— "Law (as it ought to be) is not deducible from principles

"knowable *a priori*, but from principles which must be "obtained (through induction) from experience. No ex- "perience of actual institutions, independently of the "principles which are obtained by experience of Human "Nature can be of any value."

Such views seem scarcely reconcileable with the same acute reasoner's denunciation of "the fustian which is styled "the Law of Nature!"

Kant, with logical correctness, distinguishes the giver of the 'command' *i. e.* the legislator who imposes the civil obligation, from the author or source of the 'law' (which the legislator may or may not be,) to which that obligation is attached, and which the command enforces.

Austin divided the *jus gentium* of the Pandects into three parts: 1. a 'conceit' and 'absurdity' of Ulpian alone—the mere fancy of that jurisconsult's brain: 2. a *jus naturale* answering to modern ideas of a Natural Law, "imported into the Roman Law from hypotheses of "Greek philosophers concerning the rationale of Law and "morals, by the jurists who are styled 'classical,'—of "excerpts from whose writings, the Pandects are principally "composed:" 3. a body of subsidiary Law which the *prætor peregrinus* thus produced, *viz.*—"Perpetually en- "gaged in judging between foreigners and citizens of "Rome, and between foreigners of different dependent "States, these magistrates were led to compare the several "systems of Law which obtained in the several commu- "nities composing the Roman empire. And, comparing "the several systems obtaining in those several commu- "nities, they naturally extracted from those several "systems, a system of a liberal character; free from the "narrow peculiarities of each particular system, and meeting "the common necessities of the entire Roman world."

It is certainly questionable, whether the accidental convergence or co-administration of several particular systems, *i. e.* of several peculiarities, must produce any better or

more liberal system. It may be here noted, that Romulus and his companions had certainly a choice of civilisations to copy from: and, as they brought their religion, so they could not but import or reflect much from the jural schemes of an advanced people, *viz.* Etruria; impressed however, and directed by the prædatory independence which characterised the Quirital migration.